Supreme Court, U.S.
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No. 94-982 NOV 30 1994

In The

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Supreme Court of the United States

October Term, 1994

JOHN O'NEILL and SAMUEL R. GOODMAN, on behalf of themselves and all others similarly situated,

Petitioners,

vs.

CITY OF PHILADELPHIA, PHILADELPHIA PARKING AUTHORITY, OFFICE OF DIRECTOR OF FINANCE, BUREAU OF ADMINISTRATIVE ADJUDICATION,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Did the Federal District Court abuse its discretion in declining to abstain on the basis of the *Younger v. Harris* doctrine, where Petitioners' Complaint under 42 U.S.C. § 1983 was brought at a time when there was no state prosecution or other activity outstanding against the Petitioners; and the Petitioners had voluntarily appeared before a City agency for the sole remedial purpose of requesting the agency withdraw its unlawfully obtained jurisdiction over them; and where Petitioners did not take an appeal from the adverse order of the agency through the state court system, but rather commenced this suit in the Federal District Court of the Eastern District of Pennsylvania?

Answered in the affirmative by the United States Court of Appeals for the Third Circuit.

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OPINIONS BELOW

The Opinion of the United States District Court for the Eastern District of Pennsylvania was reported in 817 F. Supp. 558 (E.D. Pa. 1993), and a copy is appended (51a). The Opinion of the United States Court of Appeals, majority and dissenting Opinions was reported in 32 F.3d 785 and a copy is appended (3a).

STATEMENT OF JURISDICTION

The Judgment of the United States Court of Appeals for the Third Circuit vacating the District Court's Judgment of March 29, 1993, remanding the case to the District Court with instructions to abstain under *Younger v. Harris* and to dismiss Petitioners' Complaint was entered on August 5, 1994. The United States Court of Appeals for the Third Circuit entered an Order denying Petitioners' timely Petition for a Rehearing on September 1,1994. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Fourteenth Amendment

Section 1. Citizens of the United States

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or

Property, without due Process of law; nor deny to any person within its jurisdiction the equal Protection of the laws.

42 U.S.C § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Title 12, The Philadelphia Code, § 12-2807(8)

Any person who has received a parking ticket, a parking citation or a summons from the Philadelphia Traffic Court charging a parking violation prior to the effective date of this Chapter may elect to contest the violation before the Director of Finance under the procedures set forth in this Chapter for the contesting of civil parking violations. If a person elects to contest the violation before the Director of Finance, he shall consent to the jurisdiction of the Director of Finance and

the adjudication of the violation by the Director of Finance, and the Parking Authority shall notify the Traffic Court that the City requests a dismissal of the summary proceeding for the parking violation in question.

STATEMENT OF THE CASE

Up to June 1, 1989, the Philadelphia Traffic Court had exclusive jurisdiction over all summary offenses (42 Pa. C.S. § 1321) arising under Title 75 (Motor Vehicles) and under the Philadelphia Code, Title 12, enacted pursuant thereto, including parking violations.

The Pennsylvania Statute of Limitations barred the City of Philadelphia from taking any action to enforce these summary offenses two years after the issuance of the summons (42 Pa. C.S. § 5333(e)).

The traffic summonses which are the subject of this lawsuit were issued to Petitioners prior to June 1, 1989 and subject to the above provisions of law.

Pursuant to state enabling legislation, the Philadelphia City Council enacted a new comprehensive Ordinance, amending Title 12 of the Philadelphia Code, entitled "Administrative Adjudication of Parking Violations", effective June 1, 1989 (City Code §§ 12-2800 *et seq.*).

It was the purpose of this new Code to reform the collection procedures of traffic tickets in Philadelphia by decriminalizing the process and creating a civil system. In particular, under the former Philadelphia Traffic Code, a defendant was required to be present in court before a disposition could be made of the case.

The City was also barred from taking any action to enforce a summons two years after its issuance.

Under the new Administrative Code a summons unanswered within fifteen days of issuance is declared in default, a fine and penalty are assessed, and recorded as a debt due and owing to the City of Philadelphia subject to collection.

The Ordinance established a Bureau of Administrative Adjudication ("BAA"), presided over by a hearing examiner. The BAA had no powers to summon an offender or enforce its adjudication. A person could appear before it on a strictly voluntary basis if he so wished to contest the debt which had been established.

The Philadelphia City Council did not transfer the jurisdiction over traffic tickets issued out of the Philadelphia Traffic Court prior to June 1, 1989. Rather, it provided that the holders of such tickets could elect to have their tickets adjudicated before the BAA, only if they gave their consent to its jurisdiction (§ 12-2807(8), Brief, p. 2).

However, the Deputy Director of Finance, a member of the executive branch of the City government, without authority to do so, transferred all traffic tickets issued out of the Philadelphia Traffic Court prior to June 1, 1989 into the jurisdiction of the BAA. Thus, all tickets then existing and unadjudicated within the exclusive jurisdiction of the Philadelphia Traffic Court had been transposed into a mature debt due and owing by the ticketholder to the City of Philadelphia in express violation of the Philadelphia Traffic Code.

The BAA thereafter sent notice to each of the more than two million such ticketholders that they could elect to proceed either before the Philadelphia Traffic Court or the BAA. However, it did

not inform them that their failure to proceed in the Traffic Court would constitute an irrevocable consent to the jurisdiction of the BAA.

Petitioners Goodman and O'Neill[1] were among the aforesaid two million ticketholders who had not responded to a summons or other notices[2], nor had they responded to the notice of the BAA of their right to elect the Traffic Court or BAA jurisdiction as set forth above.

On March 4, 1991 Goodman requested the BAA to schedule a parking ticket issued subsequent to June 1, 1989 within its jurisdiction. The BAA notified Goodman that it would list all tickets issued after June 1, 1989. When Goodman voluntarily appeared at the hearing, the hearing examiner then notified Goodman that he had listed an additional five tickets which had issued out of the Philadelphia Traffic Court prior to June 1, 1989.

Goodman, through counsel, objected on the basis of lack of jurisdiction and that the City was time-barred from taking any action on those tickets by the Statute of Limitations. These objections were overruled. Goodman was assessed fines and penalties of $173 on the Philadelphia Traffic Court tickets, and $74.10 for the BAA tickets. Goodman has paid these amounts.

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1. All parties appear in the caption of the case excepting that Defendant Philadelphia Parking Authority is no longer a party to this case.

2. *Goodman:* May 16,1989
December 7, 1988
December 11, 1987
December 11, 1987
February 26, 1987

O'Neill: May 1, 1989
October 10, 1988
November 28, 1987

In April, 1991 O'Neill voluntarily contacted the Philadelphia Traffic Court to list three outstanding tickets issuing out of that court. O'Neill was then informed by the Traffic Court that they no longer listed parking violation cases. O'Neill then requested a hearing before the BAA. At the hearing, O'Neill objected to the jurisdiction of the BAA, which the hearing examiner denied and imposed fines and penalties in the reduced amount of $45.

Neither Goodman nor O'Neill took an appeal from the hearing examiner's decision to the Parking Appeals Panel and as provided by the Ordinance, the decision became a final Order from which an appeal to the Philadelphia Court of Common Pleas could then be taken. Neither Goodman nor O'Neill took an appeal to that court.

On October 30,1991 O'Neill and Goodman filed a five count Complaint in the Federal Court for the Eastern District of Pennsylvania, and subsequently amending it to include a claim pursuant to 42 U.S.C. § 1983. Jurisdiction was based upon 28 U.S.C. §§ 1331 and 1343(3) and (4). It alleged the City of Philadelphia, acting under color of law, had violated their Fourteenth Amendment due process rights depriving them of property. On October 15, 1992 Petitioners' Motion for Class Certification was denied, but the court agreed to proceed on the basis of a constitutional test case for all persons similarly situated.

On Cross Motions for Summary Judgment the District Court granted (March 29, 1993) the City's Motion with respect to Counts One, Three, Four and Five, but declined the City's invitation to abstain under the *Younger* doctrine. The court granted Petitioners' Motion on Count Two, holding that the City's defective notice to Petitioners had deprived them, without their consent or knowledge, of a Traffic Court proceeding in

which the Statute of Limitations defense was available. Judgment was entered in favor of Goodman in the amount of $173 and the City was directed to vacate its outstanding $45 judgment against O'Neill. Because the City would be faced with a heavy financial burden concerning the potential claims of 2,713,975 persons similarly situated with regard to indisposed parking tickets issuing out of the Philadelphia Traffic Court, this portion of the Order as to supplemental relief was stayed pending appeal.

The City filed a Notice of Appeal on April 20, 1993 from the judgment in the Federal District Court. Petitioners filed a cross appeal which was subsequently withdrawn. Jurisdiction was based upon 28 U.S.C. § 1291.

Neither the statement of issues, the briefs, nor the oral argument of the City raised the issue of federal abstention in any of its forms. Panel member Senior Judge Garth raised the issue at the commencement of the City's presentation, to the exclusion of all other issues as briefed by both parties.

The Third Circuit Court of Appeals Judges Garth and Roth filed a majority Opinion August 5, 1994, holding that the District Court abused its discretion in failing to abstain from hearing O'Neill and Goodman's federal claims in deference to the overwhelming interest of the City of Philadelphia and the State of Pennsylvania with respect to their on-street parking regulations. A dissent was filed by Judge Lewis, in which he factually distinguished this case from the decisions relied upon by the majority.

REASONS FOR GRANTING THE WRIT

The United States Court of Appeals for the Third Circuit has decided an important question of federal law in a majority decision of two Justices (3a) with a Dissenting Opinion of one Justice (23a) which has not been, but should be, settled by this Court. In this case O'Neill and Goodman, after appearing before a City agency, did not appeal the resulting Final Order to the state court judicial system, but rather proceeded by filing a Complaint in the Federal District Court, Eastern District of Pennsylvania. The United States Supreme Court in *New Orleans Public Service, Inc. v. City Council of City of New Orleans,* 491 U.S. 350 (1989) at p. 369, n. 4 specifically noted that although *Younger* requires a party to a pending action in a state court to exhaust all state appellate review provided, the question of whether a party receiving a final adverse state administrative determination must proceed through a state court judicial review is still an open question.

This question has become all the more important since the federal courts of appeal have arrived at opposite conclusions on this issue. In *Allegheny Corp. v. Pomeroy et al.,* 898 F.2d 1314 (8th Cir. 1990) the Eighth Circuit Court of Appeals found that proceedings before the North Dakota Insurance Commission were judicial in nature, and an applicant who was denied relief was required to seek relief in state court judicial system and the District Court should have abstained under the *Younger v. Harris* doctrine. In *Thomas v. Texas State Board of Medical Examiners,* 807 F.2d 453 (5th Cir.1987) the Fifth Circuit Court of Appeals held that a medical doctor who was the subject of state agency proceedings to revoke his medical license was not precluded from pursuing a § 1983 cause of action in the federal courts without first having exhausted state remedies. The court held that the mere availability of state judicial review of administrative proceedings which have ended does not mean that a case is

"pending" for purposes of *Younger,* relying on the United States Supreme Court holding in *Patsy v. Florida Board of Regents,* 457 U.S. 496 (1982) that a plaintiff in a § 1983 case need not exhaust his/her administrative remedies.

A reading of the Third Circuit Court of Appeals majority and minority Opinions in this case reflects the same split of opinions exists within the Circuit. The minority Opinion sets forth a review of the compelling reasons for following the direction of the United States Supreme Court in the *Patsy* decision which, of course, are the views of the Petitioners.

Additionally, Petitioners herewith respond to the main thrust of the majority Opinion commencing on page 12 (15a) which applies the holding of *Huffman v. Pursue, Ltd.,* 420 U.S. 592 (1975) with the present City agency proceedings.

The majority at page 12, footnote 13, and again at page 13, paragraph 3 refer to the administrative proceedings in the present case as coercive, since that was an essential factual feature in *Huffman.*

However, the record in this case shows that the only action by the City was the unlawful placing of the Petitioners' Traffic Court tickets within the jurisdiction of the BAA without their required consent. This action had the effect of creating a debt due and owing by the Petitioners to the City.

The Petitioners did not appear before the BAA under compulsion of process, but rather for the remedial purpose of having their Philadelphia Traffic Court tickets removed from the jurisdiction of the BAA. There simply was no element of an enforcement effort by the City.

At the conclusion of the BAA hearings in each case the

Petitioners were found to be liable to the City in a certain sum. Thus, these proceedings had nothing to do with safety or regulation of parking as set forth by the majority at page 14 (18a), but rather the collection of a debt. The Goodman debt was paid in full so that there wasn't even the problem of debt collection pending in that instance.

The subsequent suit under § 1983 brought by Petitioners in the Federal District Court is based upon the unlawful actions of the Office of the Director of Finance in creating a debt. The refinements of parking regulations were never at issue in this action, and if the Petitioners are successful not a single change will take place in the regulation of on-street parking in Philadelphia.

Petitioners have never challenged in the present lawsuit or before the BAA the laws, regulations or procedures under which it operates. Petitioners only seek to enforce the plain and unambiguous language of the subject Ordinance which controls the means of acquisition of jurisdiction over them. An appearance before a tribunal to challenge its jurisdiction has never been held to be a submission to the processes of that tribunal since the early common law days.

The majority Opinion concern for the "aspersion on the capabilities and good faith of state appellate courts" at page 12 (17a) are not well-founded. In the present case it is clear that the Petitioners' § 1983 case is based upon the acts of the City in transferring the subject pre-June, 1989 Traffic Court parking tickets to the jurisdiction of the BAA and the failure to give full notice. The appearance of Petitioners before the BAA was not a necessary element of this action, but rather evidence of the basic facts.

It, therefore, follows that this cause of action could have

been pursued in the Federal District Court without Petitioners' participation in administrative proceedings of any kind under *Patsy v. Florida Board of Regents*, 457 U.S. 496 (1982).

The Petitioners in this case, however, went to the BAA as the simple, most expeditious and least costly method of resolving their differences. These efforts were not successful and under the court majority view, this simple effort would commit them to the state judicial processes to the end. The logic of this rule would compel future Petitioners to forego simple state administrative procedures which might efficiently solve their problems, since it would foreclose the federal court system to them.

CONCLUSION

For the reasons set forth above, and for the reasons set forth in the Dissenting Opinion in the Third Circuit Court of Appeals (23a), this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A — SUR PETITION FOR REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED SEPTEMBER 1, 1994

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 93-1378

JOHN O'NEILL; SAMUEL R. GOODMAN, on behalf of themselves and all others similarly situated

Appellees

v.

CITY OF PHILADELPHIA; PHILADELPHIA PARKING AUTHORITY; OFFICE OF THE DIRECTOR OF FINANCE; BUREAU OF ADMINISTRATIVE OFFICE OF ADJUDICATION

City of Philadelphia, Office of The Director of Finance and Bureau of Administrative Adjudication,

Appellants

SUR PETITION FOR REHEARING

Before: SLOVITER, *Chief Judge*, BECKER, STAPLETON, MANSMANN, GREENBERG, SCIRICA, COWEN, NYGAARD, ALITO, ROTH, LEWIS, MCKEE, and GARTH, *Circuit Judges*

The petition for rehearing filed by appellees in the above-

Appendix A

entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

s/ Roth
Circuit Judge

Dated: SEP 1 1994

APPENDIX B — OPINION AND JUDGMENT ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT FILED AUGUST 5, 1994

Filed August 5, 1994

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 93-1378

JOHN O'NEILL; SAMUEL R. GOODMAN, on behalf of themselves and all others similarly situated

v.

CITY OF PHILADELPHIA; PHILADELPHIA PARKING AUTHORITY; OFFICE OF THE DIRECTOR OF FINANCE; BUREAU OF ADMINISTRATIVE OFFICE OF ADJUDICATION

City of Philadelphia, Office of The Director of Finance and Bureau of Administrative Adjudication,

Appellants

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civil No. 91-06759)

Argued October 28, 1993

BEFORE: ROTH, LEWIS and
GARTH, *Circuit Judges*

(Opinion filed August 5, 1994)

Appendix B

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OPINION OF THE COURT

GARTH, *Circuit Judge*:

This appeal requires us to determine whether the federal courts must entertain a constitutional challenge to the City of Philadelphia's parking ticket procedures that resulted in the imposition of a $45 fine against plaintiff-appellee John O'Neill, which remains unpaid, and a $173 fine against plaintiff-appellee Samuel Goodman, which was paid. We hold that the district court

should have exercised its discretion to abstain, rather than to decide the constitutionality of Philadelphia's ticketing procedures. Thus, we will vacate the district court's judgment and remand with instructions that the district court dismiss the plaintiffs' complaint.

I

John O'Neill ("O'Neill") and Samuel Goodman ("Goodman") brought suit in federal district court against the City of Philadelphia, the Philadelphia Parking Authority, the Office of the Director of Finance, and the Bureau of Administrative Office of Adjudication (collectively, the " City"), alleging that the City's reorganization of its system for adjudicating parking tickets violated their constitutional rights, and the constitutional rights of similarly situated plaintiffs. On March 29, 1993, the district court granted summary Judgment in favor of the plaintiffs on their due process claim, vacating the City's $45 fine against O'Neill, and entering judgment in the amount of $173 in favor of Goodman. *O'Neill v. City of Philadelphia* 817 F. Supp. 558 (E.D. Pa. 1993).

Although the district court declined the City's invitation to abstain from exercising jurisdiction over this action, *id.* at 562 n.8, and despite the City's failure to protest the district court's abstention determination on appeal, we asked the parties to submit supplemental briefs addressing the question of whether the district court properly should have abstained from entertaining the plaintiffs' claims under the abstention doctrine announced by the Supreme Court in *Younger v. Harris*, 401 U.S. 37 (1971), and its progeny.[1]

We conclude that the district court abused its discretion in

1. Even though the question of *Younger* abstention was not raised by the parties on appeal, we may consider it *sua sponte*. *Bellotti v. Baird*, 428 U.S. 132, 143-44 n.10

(Cont'd)

refusing to abstain under *Younger* and in reaching the merits of O'Neill and Goodman's due process claim.

II.

A.

Prior to June 1, 1989, the "Traffic Court of Philadelphia" had original jurisdiction to adjudicate parking violations committed in the City of Philadelphia. 42 Pa. Cons. Stat. Ann. §§ 1302 and 1321. Appeals from the traffic court's decisions were heard by the Pennsylvania Court of Common Pleas.

(Cont'd)
(1976); *McLaughlin v. Pemsley*, 876 F.2d 308, 314 n.5 (3d Cir. 1989); *Blake v. Kline*, 612 F.2d 718, 727 (3d Cir. 1979). *Cf. Winston v. Children and Youth Servs.*, 948 F.2d 1380, 1384-85 (3d Cir. 1991) (declining to address question of abstention where defendants failed to preserve the issue for appellate review). *But see id.* at 1396-98 (Garth, J., dissenting) (citing cases holding that failure to file a cross appeal did not preclude Court of Appeals' consideration of particular issues).

In addition, we note somewhat surprisingly that we are not the first federal Court of Appeals to focus on the *Younger* problems that arise when parking tickets are challenged in § 1983 actions. In a case similar to the one before us on appeal, the Seventh Circuit decided that *Younger* abstention was appropriate where the federal claimant had initiated a federal action instead of contesting his numerous parking violations in the available state forum. *Jacobson v. Village of Northbrook Mun. Corp.*, 824 F.2d 567 (7th Cir. 1987). *See also Horn v. City of Chicago*, 860 F.2d 700 702 n.5 (7th Cir. 1988) (reversing district court s holding that parking ticket demand notices issued by the City of Chicago violated the plaintiffs' due process rights and seriously questioning district court's conclusion that *Younger* abstention was not appropriate); *Ballard v. Wilson*, 856 F.2d 1568 (5th Cir. 1988) (holding that *Younger* precluded consideration of claims for injunctive and declaratory relief while state criminal prosecutions were pending against Ballard on his thirty-six violations of the City of Houston's overtime parking ordinance); *Friedman v. Beame*, 558 F.2d 1107 (2d Cir. 1977) (recognizing but refusing to decide *Younger* issue in action challenging City of New York's parking regulations).

Appendix B

In 1989, the Philadelphia City Council reorganized the City's system for adjudicating parking tickets by enacting an ordinance which authorized the Office of the Director of Finance to assume control over the regulation and disposition of parking violations in the City of Philadelphia. 12 Phila. City Code § 12-2802(1). Under the new framework, a parking ticket is affixed to the vehicle, *id.* § 12-2804(3), and the owner of the ticketed vehicle is sent a notice by first class mail. *Id.* § 12-2805(1). The person to whom the ticket is issued has fifteen days to answer it, either admitting the violation by payment of the fines, costs, and fees, admitting with explanation, or denying liability and requesting a hearing. *Id.* § 12-2806(1). A failure to answer or to pay the fine will result in a Bureau of Administrative Adjudication ("BAA")[2] hearing examiner's entering an order by default sustaining the charges, fixing the appropriate fine, and assessing appropriate costs and fees. *Id.* § 12-2807(3).

When the violation is contested, and a hearing is requested, a BAA hearing examiner holds a hearing and determines whether the charges have been established. *Id.* § 12-2807. Once the hearing examiner has entered his decision, the violator has thirty days to file an appeal to the BAA Parking Appeals Panel. *Id.* § 12-2808. The BAA's decision, or a default by the ticket holder, creates a debt owed to the City. *Id.* § 12-2808(5). The decision of the Parking Appeals Panel can be appealed to the Pennsylvania Court of Common Pleas, and through the state judicial system. 2 Pa. Cons. Stat. Ann. § 752.[3]

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2. Regulations adopted by the Director of Finance created the Bureau of Administrative Adjudication for the purpose of exercising the duties and powers enumerated in chapter 12-2800 of the Philadelphia City Code, the chapter added by the 1989 ordinance.

3. Section 752 provides as follows: "Any person aggrieved by an adjudication (Cont'd)

Appendix B

The effect of the 1989 reorganization was to change the nature of parking violations from summary offenses, which were criminal in nature, to civil violations. In practice, a defendant before the traffic court was entitled to three rights not available at a BAA hearing: (1) a disposition could not be made without the personal appearance of the defendant, (2) the defendant's guilt had to be proved beyond a reasonable doubt, and (3) the two-year statute of limitations for summary offenses was in effect.[4]

Finally, the new ordinance created a period of dual jurisdiction during which a person who had received a parking ticket, citation, or traffic court summons between October 2, 1987 and May 31, 1989, could choose to proceed either in traffic court or before the BAA. 12 Phila. City Code § 12-2807(8).

B.

O'Neill and Goodman had received parking tickets both before and after the effective date of the 1989 ordinance.[5] Neither

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(Cont'd)
of a local agency who has a direct interest in such adjudication shall have the right to appeal therefrom to the court vested with jurisdiction of such appeals by or pursuant to Title 42 (relating to judiciary and judicial procedure)."

4. O'Neill and Goodman argue that they were unconstitutionally deprived of rights which were only available in traffic court. We know of no constitutional right. however, to a hearing before a tribunal of one's own choosing, *see Crane v. Hahlo,* 258 U.S. 142, 147 (1928); *Sill v. Pennsylvania State University,* 462 F.2d 463, 469 (3d Cir. 1972), or to assert a defense based upon a given statute of limitations. *See Chase Securities Corp. v. Donaldson,* 325 U.S. 304 (1945).

5. The plaintiffs' claims relate only to the retrospective application of the reorganized adjudicatory procedures to the parking tickets they received prior to June 1, 1989. The tickets which fall into this category were issued on the following dates:
(Cont'd)

paid their fines. Neither responded to the summons and periodic payment-notices which were sent to them. In particular, neither answered "Violation Warning Notice[s]" sent in November 1989 by the Office of the Director of Finance explaining that they could elect to appear before the traffic court or the BAA for the purpose of contesting their outstanding tickets. Nor did they respond to "Order[s] of Default" informing them that their failure to pay the fines could result in the City's taking further legal action which might have an adverse effect on their property rights.[6]

On March 4, 1991, Goodman requested a hearing before the BAA to contest a ticket he had received on February 4, 1991. The hearing examiner held such a hearing on March 18, 1991, at which it assumed jurisdiction over the February 4 ticket, and nine additional tickets for which Goodman was responsible. Five of the

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(Cont'd)

Goodman	O'Neill
May 16, 1989	May 1, 1989
December 7, 1988	October 10, 1988
December 11, 1987	November 28, 1987
December 11, 1987	
February 26, 1987	

6. While we need not reach the merits of the plaintiffs' constitutional claim, we note that at least one other Court of Appeals has held that individuals who have received, but purposefully ignored, timely and repeated notices alerting them of their right to a hearing at which they could contest parking violations, are in no position to argue that those notices deprived them of due process. *See Saukstelis v. City of Chicago*, 932 F.2d 1171 (7th Cir. 1991) (holding car owner who ignored ten tickets, follow-up notices, and 21-day warning of eligibility for booting, could not insist that city violated his due process rights by putting "Denver Boot" on his car). Saukstelis had been denied a preliminary injunction, giving rise to the appeal. Despite that posture of the case, the Seventh Circuit remanded with instructions "to enter judgment for the City wtthout further ado." *Id.* at 1174.

tickets dated from before June 1, 1989. Five dated from after June 1, 1989.

Goodman objected that the BAA lacked jurisdiction to determine his liability on the pre-June 1, 1989 tickets, and that, in any event, he had the right to raise the statute of limitations as a defense in the BAA proceeding. The hearing examiner overruled Goodman's objections and assessed total fines of $173.00 for the pre-June 1, 1989 tickets, and $74.10 for the post-June 1, 1989 tickets. Goodman paid his fines.[7]

In April 1991, O'Neill attempted to list for disposition with the traffic court three pre-June 1, 1989 parking tickets. The traffic court informed him that it no longer heard parking violation cases. O'Neill then requested a hearing with the BAA at which he raised the same objections as Goodman. On August 30, 1991, the BAA hearing examiner rejected O'Neill's objections but reduced his liability for the outstanding parking tickets to $45.00. O'Neill has not paid his fine.

On October 30, 1991, O'Neill and Goodman filed a five-count complaint (later amended) against the City of Philadelphia, pursuant to 42 U.S.C. § 1983, alleging that the City had violated their constitutional and state-law rights by denying them a hearing before the traffic court with respect to the parking tickets they had received prior to June 1, 1989.[8] On October 15, 1992, the district

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7. Even though Goodman has paid his fines, a possible refund of those fines constitutes a collateral consequence sufficient to prevent mootness. *Elkin v. Fauver*, 969 F.2d 48, 53-54 n.4 (3d Cir. 1992); *Nakell v. Attorney Gen.*, 15 F.3d 319, 322 (4th Cir. 1994).

8. Count One alleged that the City had violated the plaintiffs' due process rights by denying them the rights which had been available in traffic court.

(Cont'd)

court denied the plaintiffs' motion for class certification but agreed to consider the action as a test case for persons similarly situated. The case was submitted on cross motions for summary judgment.[9]

On March 29, 1993, the district court granted the City's motion for summary judgment as to four of the five constitutional claims alleged in the plaintiffs' complaint.[10] With respect to the

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(Cont'd)

Count Two alleged that the City had violated the plaintiffs' due process rights, and the *Ex Post Facto* clause of the United States Constitution, by failing to obtain the plaintiffs' consent to its jurisdiction, as required by the City ordinance, and by applying the laws and regulations governing hearings under the 1989 ordinance, and not those of the traffic court.

Count Three alleged that the City exceeded the authority granted under Pennsylvania law by unlawfully extending the BAA's subject matter jurisdiction.

Count Four alleged that the BAA violated the U.S. and Pennsylvania Constitutions by holding hearings on parking violations that were time barred under Pennsylvania law.

Count Five alleged § 12-2807(4) is an unconstitutional Bill of Attainder to the extent it subjects the plaintiffs' vehicles to seizure without a hearing.

9. The City argues that the district court lacked jurisdiction to hear the plaintiffs' claims. In particular, the City argues that because the plaintiffs did not appeal the hearing examiner's determination to the Parking Appeals Panel, under 12 Phila. City Code § 12-2808(5), the Finance Director's Office had not reached a final decision as to the plaintiffs' liability, and that, therefore, the plaintiffs' federal suit was premature. We disagree. Section 12-2808(5) explicitly provides that "in the event that no appeal is taken [to the Parking Appeals Panel], the order of the Parking Hearing Examiner shall be the final order [of the Finance Director's Office]."

10. The plaintiffs-appellees have not appealed the district court's grant of

(Cont'd)

remaining count ("Count Two"), however, the district court held that the City's failure to allow the plaintiffs to challenge their pre-June 1, 1989 tickets in traffic court, as opposed to the BAA, violated the plaintiffs' due process rights. Consequently, the district court entered judgment in favor of Goodman in the amount of $173.00, and directed the City to vacate its outstanding $45.00 judgment against O'Neill.

The district court also ordered the parties to submit memoranda as to the appropriate terms of relief, and procedure to be adopted by the BAA, with respect to the 2,713,975 persons similarly situated to O'Neill and Goodman (i.e., persons who had indisposed of parking violation summonses issued before June 1, 1989). Recognizing the potentially heavy financial burden such relief might place on the City's resources, the district court stayed this latter portion of its order pending appeal.

We have jurisdiction over the City's appeal from the partial grant of summary judgment in favor of O'Neill and Goodman pursuant to 28 U.S.C. § 1291.

III

The abstention doctrine first announced by the Supreme Court

(Cont'd)
summary judgment against them on the constitutional claims alleged in Counts One, Four, and Five, nor its grant of summary judgment with respect to the ex *post facto* allegations in Count Two. Because the plaintiffs did not press for summary judgment on the state claims alleged in Counts Three and Four of their complaint, the district court deemed them to have been withdrawn without prejudice. The district court's judgment is found in its entirety at *O'Neill v. City of Philadelphia*, 817 F. Supp. at 570-71 (E.D. Pa. 1993).

in *Younger v. Harris,* 401 U.S. 37 (1971), in the context of a pending state criminal prosecution, has since been extended to non-criminal state civil proceedings, *Huffman v. Pursue, Ltd.,* 420 U.S. 592 (1975), and state administrative proceedings, *Middlesex County Ethics Comm. v. Garden State Bar Ass'n,* 457 U.S. 423, (1982), in which important state interests are implicated, so long as the federal claimant has an opportunity to raise any constitutional claims before the administrative agency or in state-court judicial review of the agency's determination. *Ohio Civil Rights Comm'n v. Dayton Christian Sch., Inc.,* 477 U.S. 619, 629 (1986).

In *Middlesex,* the Supreme Court delineated three requirements which must be satisfied before a federal court may abstain from hearing a case over which it has jurisdiction: (1) there must be pending or ongoing state proceedings which are judicial in nature; (2) the state proceedings must implicate important state interests; and (3) the state proceedings must afford an adequate opportunity to raise any constitutional issues. 457 U.S. at 432; *Olde Discount Corp. v. Tupman.* 1 F.3d 202, 211 (3d Cir. 1993).[11]

A.

"We exercise plenary review over the legal determinations of whether the requirements for abstention have been met. [Citations omitted.] Once we determine that the requirements have been met, we review a district court's decision to abstain under *Younger* abstention principles for abuse of discretion." *Gwynedd Properties, Inc. v. Lower Gwynedd Township,* 970 F.2d 1195, 1199 (3d Cir. 1992).

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11. Even if these three elements are satisfied, abstention is not appropriate where the federal claimant makes a showing of bad faith, harassment, or some other extraordinary circumstance. *Middlesex,* 457 U.S. at 435. We note that, in the present case, no such extraordinary circumstances exist.

Appendix B

1.

We need not belabor the question of whether a BAA proceeding is "judicial in nature." Clearly, it is. *See Williams v. Red Bank Bd.. of Ed.*, 662 F.2d 1008, 1020-21 (3d Cir. 1981).[12] The more compelling issue is whether, in the present case, there is a "pending" state proceeding inasmuch as O'Neill and Goodman filed their federal lawsuit in lieu of appealing the hearing examiner's determination, and in lieu of raising their constitutional claims in the state forum.

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12. Under 12 Phila. City Code § 12-2807, hearings must be conducted "in a fair and appropriate rnanner." The defendant may call witnesses, supplement testimony by affidavits, and interpose legal arguments. While the technical rules of evidence do not apply, "all relevant evidence of reasonably probative value may be received." Testimony must be given under oath. A record of the proceeding must be made. The hearing examiner is authorized to conduct extensive fact-finding and to compel the production of any document, paper, or record relevant to the violation charged. He must issue his decision based on the evidence and arguments offered.

Under 12 Phila. City Code § 12-2808(2), the Parking Appeals Panel:

> shall have the power to review the facts and the law, and shall have power to affirrn the determination or to reverse or modify any determination appealed from for error of fact or law, or to remand for additional proceedings, or, in appropriate cases, to hear the matter de novo.

See, e.g., Middlesex, 457 U.S. at 423 (holding state bar disciplinary proceedings judicial in nature where local attorney ethics committees act as an arm of the state supreme court in performing the function of receiving and investigating complaints and holding hearings). *But see New Orleans Pub. Serv., Inc. v. Council of City of New Orleans*, 491 U.S. 369-73 (1989) (holding ratemaking proceeding because the setting of future utility rates essentially is a legislative act).

Appendix B

It is a well-settled that, "[f]or *Younger* purposes, the State's trial-and-appeals process is treated as a unitary system, and for a federal court to disrupt its integrity by intervening in midprocess would demonstrate a lack of respect for the State as sovereign." *New Orleans Pub. Serv., Inc. v. Council of City of New Orleans*, 491 U.S. 350, 369 (1989) ("*NOPSI*"). Thus, "a necessary concomitant of *Younger* is that a party [wishing to contest in federal court the judgment of a state judicial tribunal] must exhaust his state appellate remedies before seeking relief in the District Court." *Id., quoting Huffman v. Pursue, Ltd.*, 420 U.S. 592, 608 (1975).

In contrast to *Huffman* where the federal claimant had failed to appeal a state trial court judgment against it, here, O'Neill and Goodman have failed to seek state-court judicial review of an order entered in a state administrative proceeding. We are faced, then, with the question left unanswered by the Supreme Court in *NOPSI:* whether a state proceeding is "pending," and *Younger* abstention proper, where the adjudicatory process has become final as a result of the federal claimant's failure to pursue state-court judicial review of an unfavorable state administrative determination? 491 U.S. at 369 & n.4 (1989).

The Courts of Appeals have furnished contradictory answers to this question. *Compare Thomas v. Texas State Bd. of Med. Exam.*, 807 F.2d 453, 456 (5th Cir. 1987) (holding "mere availability of state judicial review of state administrative proceedings does not amount to the pendency of state judicial proceedings within the meaning of *Younger with Allegheny Corp. v. Pomeroy*, 898 F.2d 1314 (8th Cir. 1990) (holding district court should have abstained where Alleghany had filed action in federal court instead of appealing state administrative decision to North Dakota state courts).

Appendix B

We have been given no reason why a litigant in a state administrative proceeding should be permitted to forego state-court judicial review of the agency's decision in order to apply for relief in federal court. Rather, we find the grounds offered by the Supreme Court to support its holding in *Huffman* — that state appellate review of a state court judgment must be exhausted before federal court intervention is permitted — are equally persuasive when considered with respect to state-court judicial review of a state administrative determination.[13]

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13. We find no inconsistency between our holding and the principle that administrative remedies need not be exhausted prior to bringing a § 1983 action in federal court. *Patsy v. Florida Bd. of Regents*, 457 U.S. 496 (1982). As the Supreme Court stated in *Dayton Christian Schools*:

> The application of *Younger* principles to pending state administrative proceedings is fully consistent with *Patsy* . . . , which holds that litigants need not exhaust their administrative remedies prior to bringing a § 1983 suit in federal court. *Cf. Huffman v. Pursue, Ltd.*, 420 U.S. 592, 607-11 (1975). Unlike *Patsy*, the administrative proceedings here are coercive rather than remedial, began before any substantial advancement in the federal action took place, and involve an important state interest.

477 U.S. at 627-28 n.2. The critical distinction between *Dayton Christian Schools* and *Patsy* is that *Patsy* involved a *remedial* action brought by the plaintiff to vindicate a wrong which had been inflicted by the State. In contrast, *Dayton Christian Schools* involved an administrative proceedings initiated by the State, before a state forum to enforce a violation of state law. That is, in *Dayton Christian Schools*, the action taken by the Ohio Civil Rights Commission was *coercive* rather than remedial, just as the action taken by the City of Philadelphia, to enforce its traffic tickets against O'Neill and Goodman, was coercive action which the plaintiffs sought to circumvent by filing their complaint in federal court.

First, federal intervention before a state court has had the opportunity to review an agency's decision is no less an "aspersion on the capabilities and good-faith of state appellate courts," and no "less a disruption of the State's efforts to protect interests which it deems important," 420 U.S. at 608, than the federal intervention with the state judicial appellate process explicitly condemned in *Huffman.* Second, federal intervention which would annul the results of an agency determination would deprive "'the States of a function which quite legitimately is left to them," i.e., the disposition of constitutional issues which arise in litigation over which they have jurisdiction. *Id.* at 609.

The requirement that litigants pursue state-court judicial review of state administrative decisions serves two additional purposes, identified by the Eighth Circuit in *Pomeroy,* which go to the very heart of the "comity" concerns upon which *Younger* abstention is grounded: (1) "the state courts may construe state law in a way which renders a constitutional decision unnecessary," *id.* 898 F.2d at 1317, *citing Penzoil Co. v. Texaco, Inc.,* 481 U.S. 1 (1987) (stating that an "important reason for abstention is to avoid unwarranted determination of federal constitutional questions"), and (2) "interests of comity are advanced, and friction reduced, if the courts of a state, rather than the federal courts, determine that the United States Constitution requires the state to alter its practices." *Pomeroy,* 898 F.2d at 1318.

We therefore hold that state proceedings remain "pending," within the meaning of *Younger* abstention, in cases such as the one before us, where a coercive administrative proceeding has been initiated by the State in a state forum, where adequate state-court judicial review of the administrative determination is available to the federal claimants, and where the claimants have chosen not to pursue their state-court judicial remedies, but have instead sought to invalidate the State's judgment by filing a federal action.

Appendix B

2.

The second prong of the *Middlesex* test is whether the proceedings at issue implicate an important state interest. This factor goes to the very core of the raison d'etre of *Younger* abstention inasmuch as the Supreme Court's holding in *Younger* rested primarily on considerations of "comity," a concept which encompasses " a proper respect for state functions." 401 U.S. at 44.

Accordingly, "when we inquire into the substantiality of the State's interest in its proceedings we do not look narrowly to its interest in the *outcome* of the particular case — which could arguably be offset by a substantial federal interest in the opposite outcome. Rather, what we look to is the importance of the generic proceedings to the State." *NOPSI,* 491 U.S. at 364-65.

It would well nigh be impossible to overstate the point that the federal courts have no interest whatsoever in the underlying subject matter of this litigation the City of Philadelphia's on-street parking regulations. In contrast, the City of Philadelphia has a vital and critical interest in the functioning of a regulatory system, such as the one at issue here, which is intimately associated with the physical and financial workings of the city in general, and of the municipal government in particular.

Prior Supreme Court decisions have held that the states have a substantial interest in enforcing criminal laws that bear a close relationship to criminal proceedings, *Huffman*, 420 U.S. at 604, in regulating attorney conduct, *Middlesex,* 457 U.S. at 434, in administering child custody proceedings, *Moore v. Sims,* 442 U.S. 415 (1979), in preventing sex discrimination against employees, *Dayton Christian Schools,* 477 U.S. at 628, and in regulating

intrastate utility rates. *NOPSI*, 491 U.S. at 365.[14]

We do not believe that we exaggerate the scope of these decisions in holding that the City of Philadelphia has a significant and substantial interest in the regulation of on-street parking, and in the vindication of the system it has implemented to adjudicate violations of those regulations.[15] The plaintiffs, in fact, have conceded as much in their supplemental brief. *See* Appellee's Supp. Br. at 1 ("This case involves the regulation and administration of on-street parking which, of course, is an important interest to the State of Pennsylvania and the City of Philadelphia.").

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14. We have held that the states have a substantial interest in education, *Williams v. Red Bank Bd. of Ed.*, 662 F.2d at 1017-18 (3d Cir. 1981) (noting that states interest in education is not weakened by the fact that, technically, local school boards press disciplinary charges against teachers, and not the State), and in regulating securities transactions. *Olde Discount Corp. v. Tupman*, 1 F.3d at 212 (3d Cir. 1993). *See also Mission Oaks Mobile Home Park v. City of Hollister*, 989 F.2d 359, 361 (9th Cir. 1993) (finding important state interest in regulating mobile home parks even though rental rates are regulated by local ordinance rather than statewide law); *Federal Express Corp. v. Tennessee Pub. Serv. Comm'n*, 925 F.2d 962. 969 (6th Cir. 1991) (affirming district court's finding important state interest in regulating intrastate trucking).

15. The Supreme Court has recognized that "[t]he importance of the state interest may be demonstrated by the fact that the noncriminal proceedings has a close relationship to proceedings criminal in nature." *Middlesex*, 457 U.S. at 432. Until May 31, 1989, of course, parking infractions in the City of Philadelphia were criminal offenses. Simply because parking violations are the least threatening of all motor vehicle violations — and are now civil offenses in the City of Philadelphia — does not mean that the State's overriding interest in enforcing its motor vehicle laws, many of which remain criminal in nature, has had its importance diluted.

Appendix B

3.

The third prong of our inquiry is whether the claimant is afforded an adequate opportunity to raise his constitutional claims in the state forum. The Supreme Court has held that this third element is satisfied in the context of a state administrative proceeding when the federal claimant can assert his constitutional claims during state-court judicial review of the administrative determination. *Dayton Christian Schools*, 477 U.S. at 629; *Middlesex*, 457 U.S. at 436. Moreover, "when a litigant has not attempted to present his federal claims in related state-court proceedings, a federal court should assume that state procedures will afford an adequate remedy, in the absence of unambiguous authority to the contrary." *Penzoil Co. v. Texaco, Inc.*, 481 U.S. at 15.

In the present case, neither O'Neill nor Goodman attempted to raise his federal claims in the state proceedings. Accordingly, we would be well-justified in assuming that, had they done so, they would have been afforded an adequate remedy.[16] In any event, it is undisputed that O'Neill and Goodman could have raised their constitutional arguments before the administrative review board, again in the state-court appellate process, to and through the Pennsylvania Supreme Court, and, ultimately, before the United

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16. In *Williams v. Red Bank Bd. of Ed.*, 662 F.2d 1008 (3d Cir. 1981), we held that a federal claimant is afforded an opportunity to assert her constitutional claims in the state forum where an administrative board is authorized to dismiss the charges against the claimant. In this respect, we note that the BAA Parking Appeals Panel is authorized "to review the facts and the law, and shall have the power to affirm the [hearing examiner's] determination or to reverse or modify any determination appealed from for error of fact or law, or to remand for additional proceedings, or, in appropriate cases. to hear the matter de novo." 12 Phila. City Code § 12-2808(2).

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States Supreme Court. *See* 28 U.S.C. § 1257(a).[17]

B.

In sum, we hold that the three-prong test for *Younger* abstention is satisfied in the present case. The BAA proceeding was a judicial proceeding which may be deemed "pending" as a result of O'Neill's and Goodman's failure to take advantage of the appellate remedies which were available to them. The implementation of Philadelphia's procedures for adjudicating parking tickets implicates important state (and not federal) interests. Lastly, O'Neill and Goodman could have asserted their constitutional claims in the state proceedings.

Anxious though we may be "to vindicate and protect federal rights and federal interests," *Younger,* 401 U.S. at 44, considerations of comity demand that we remain sensitive to the legitimate interests of the states. Since this case does not involve any of the extraordinary circumstances which would otherwise make abstention inappropriate, we hold that the district court abused its discretion in failing to abstain from hearing O'Neill and Goodman's federal claims in deference to the overwhelming interest of the City of Philadelphia and the State of Pennsylvania with respect to their on-street parking regulations.

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17. 28 U.S.C. § 1257 provides in relevant part as follows:

> **(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where . . . the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution. . . .**

Appendix B

IV

Therefore, we will vacate the district court's judgment of March 29, 1993, and remand this case to the district court with instructions to abstain under *Younger v. Harris*, and to dismiss the plaintiffs' complaint.

Costs will be taxed against O'Neill and Goodman.

Appendix B

LEWIS, *Circuit Judge*, dissenting.

Chief Justice Marshall may well have overstated his point when, writing for the Court in *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821), he stated: "We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution." Marshall's absolutist view of the federal courts' duty to exercise the jurisdiction Congress and the Constitution afford them is frequently quoted, but of course, it has not been faithfully followed.[1] Abstention decisions, among others, demonstrate that federal courts can and do decline to hear cases that they have the constitutional and statutory authority to decide. *But see New Orleans Pub. Serv., Inc. v. New Orleans*, 491 U.S. 350, 358 (1989) ("*NOPS*") (stating that "federal courts lack the authority to abstain from the exercise of jurisdiction that has been conferred", and describing abstention cases as merely restricting the availability and timing of certain forms of relief). Nonetheless, the ideal behind Marshall's statement in *Cohens* remains a meaningful one; even the decisions disproving its accuracy recognize and come to terms with the significant degree of truth to its directive. In *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976), for example, where the Supreme Court concluded that federal jurisdiction should not be exercised, it cautioned that abstention "represents an extraordinary and

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1. Professor Shapiro has pointed out that the circumstances of *Cohens*, a case requiring Marshall to assert and defend the Supreme Court's authority to review state court decisions, might account for the "frightening" tenor and content of his pronouncement. David L. Shapiro, "Jurisdiction and Discretion," 60 N.Y.U. L. Rev. 543, 543-44 (1985). He suggests as well that on at least one other occasion, in *Mason v. Ship Blaireau*, 6 U.S. (2 Cranch) 240, 264 (1804), Marshall seemed to recognize that federal courts did retain a degree of discretion not to exercise jurisdiction that undoubtedly existed. *Id.* at 545 n.12 and accompanying text.

narrow exception to the duty of a District Court to adjudicate a controversy properly before it." *Id.* at 813 (quoting *County of Allegheny v. Frank Mashida Co.*, 360 U.S. 185, 188-89 (1959)). This "obligation of the federal courts to exercise the jurisdiction given them," the Court later emphasized, is "virtually unflagging." *Id.* at 817; *see also NOPSI,* 491 U.S. at 359 (same); *Deakins v. Monaghan,* 484 U.S. 193, 203 (1988) (same). Thus, as we recently reiterated, "[a]bstention is the exception and not the rule." *Marks v. Stinson*, 19 F.3d 873, 881 (3d Cir. 1994); *see also NOPSI,* 491 U.S. at 359 (same); *Colorado River,* 424 U.S. at 813 (same). "Abdication of the obligation to decide cases can be justified under this doctrine only in exceptional circumstances where the order to the parties to repair to the State court would clearly serve an important countervailing interest." *Kentucky West Virginia Gas Co. v. Pennsylvania Public Utility Comm'n,* 791 F.2d 1111, 1114 (3d Cir. 1986) (quoting *County of Allegheny,* 360 U.S. at 188-89).

In light of these well-established principles, I believe that the majority's expansion of the *Younger* abstention doctrine is clearly unwarranted. This area of the law is no place for inflexible absolutes. (With all due respect to Chief Justice Marshall, not even he could convince me that my colleagues in the majority have committed treason to the Constitution.) But at the very least, a federal court's reasons for abdicating its responsibility to decide cases over which it has jurisdiction should be quite strong. In my view, the reasons supporting the majority's decision that abstention is mandated here are not nearly adequate.

I.

The plaintiff-appellees, John O'Neill and Samuel Goodman, initiated proceedings in Philadelphia's (the City) Bureau of Administrative Adjudication (BAA) to challenge several parking

tickets they had received. In response to Goodman's and O'Neill's requests, the BAA scheduled hearings to review their tickets. In addition, however, the BAA decided that at the same time, it would adjudicate a group of older tickets that the plaintiffs had received prior to June, 1989. When the plaintiffs discovered this, they objected that the BAA did not have the authority to make rulings on the older tickets. The BAA hearing examiners who presided over their cases rejected these arguments.[2]

The City concedes and in fact relies on the point that in deciding to adjudicate Goodman's and O'Neill's older (pre-June,

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2. The BAA does not, and legally cannot, initiate hearings to review parking tickets. As I discuss below, it is not a court of record. It has no authority to issue a summons or a warrant, nor can it enter a civil judgment. App. at 404-05. The majority describes the administrative proceedings that occurred here as "coercive" action taken by the City. Maj. Op. at 12 n.13. In my view, that is not correct. The only conceivably coercive, proactive conduct the BAA took in this case was directly prohibited by local ordinance.

The facts of *Ohio Civil Rights Comm'n v. Dayton Christian Schools*, 477 U.S. 619 (1986), which the majority views as describing "coercive" state-initiated action similar to that which occurred here, are notably different. In *Dayton Christian Schools*, a state agency acting within its lawful authority initiated an administrative action against a private school by filing a complaint. *Id.* at 624. While those administrative proceedings were pending, the school filed a § 1983 suit in federal district court. Here, in contrast, Goodman and O'Neill initiated the administrative process by requesting a hearing. The BAA did not and could not require them to do so. It is legally incapable of coercing participation by unwilling individuals. The agency did act independently and contrary to the plaintiffs' wishes when it assumed jurisdiction over their older tickets. As the City points out, however, that action was flatly prohibited by local ordinance. The City thus describes the state action challenged here as an unfortunate and legal by indefensible (but not unconstitutional) mistake. In deciding to adjudicate Goodman's and O'Neill's older tickets, therefore, the BAA hearing officers were acting contrary to the state's interests and instructions; they were not acting in furtherance of the state's valid goals. I discuss the legal significance of these facts below. For now, I only mean to set them straight.

1989) parking tickets, the BM hearing examiners plainly failed to follow the local ordinance setting forth the agency's powers and procedures. *See* Phila. City Code § 2800 *et seq.* A provision of that ordinance states that if a person elects to contest a parking ticket he received prior to the date the ordinance became effective, he must consent to the BAA's jurisdiction to adjudicate that ticket. Phila. City Code § 2807(8). The ordinance went into effect on June 1, 1989. The plaintiffs did not consent to and, in fact, expressly challenged the BAA's jurisdiction to adjudicate their older tickets. Thus, the BAA hearing examiners acted contrary to law in addressing the infractions that Goodman and O'Neill had been charged with committing prior to June, 1 989.

The fact that the hearing examiners overlooked the clear requirements of an applicable provision of the City Code is understandable. Their job is to fairly and efficiently dispose of challenges to parking tickets, a task that generally does not require any extensive legal training or research. While the record does not provide a comprehensive description of the educational and professional backgrounds of BAA hearing examiners, I think we can safely assume that they are not attorneys. Dominic Ceremeli who, as a Deputy Director of Finance in charge of BAA operations, supervises the hearing examiners, acts as an instructor during their training, and presides over hearings himself when needed — testified during his deposition that he is a high school graduate, has some college education but no degree, and has not attended law school. Presumably, at least as a general matter, the hearing examiners serving under Ceremeli do not possess more advanced legal credentials.

And given the job that hearing examiners do, they should not need much specialized training in the law. The examiners are not expected to evaluate complex legal arguments. They determine what happened and decide whether that conduct constituted a

parking violation. Accordingly, in the chapter of the Parking Hearing Examiner Manual that covers defenses that ticket recipients might raise, the subject of federal statutory or constitutional rights never comes up. Instead, the examiners learn, for example, that a "Going to the Bathroom" defense should not succeed; after all, the Manual correctly explains, "This is a risk all drivers take." App. at 213.[3] I do not mean to trivialize the important and often difficult work that the BAA and its hearing examiners do in adjudicating challenges to parking tickets. It is clear, however, that nobody in or outside City government has ever believed that the people who preside over this administrative process would possess either the inclination or ability to evaluate the kind of claims that arise under the federal civil rights statutes. Quite simply, that is not the BAA's job. *See* BAA "Mission Statement", App. at 174 (describing the BAA's purpose and goals, which include fairness and efficiency but not the protection of federal rights).

Goodman and O'Neill could have initiated an administrative appeal before the Parking Appeals Panel within thirty days of the date on which the hearing officers entered final determinations in their cases. They did not do so. Rather, more than seven months after Goodman's hearing and two months after O'Neill's, they filed this § 1983 suit in federal district court, claiming, among other things, that by adjudicating their older tickets, the City had deprived them of property without due process of law in violation of their Fourteenth Amendment rights. Significantly, then, when

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3. The tone and content of the Manual further supports my belief that the BAA hearing examiners are not attorneys. Otherwise, the Manual would not need to inform its readers that "[t]he legal system over hundreds of years has developed very complicated rules of evidence." App. at 187. Nor, presumably, would it contain advice like: "It is important that you listen carefully and pay attention"; or, "In addition to paying attention, it is important that a Hearing Examiner does not lose his temper." App. at 184.

Goodman and O'Neill initiated their suit in federal court, the state administrative process was over. Nothing was pending before the BAA, and any effort the plaintiffs might have made to return there to revive and pursue their administrative proceedings would have been rejected as time-barred. *See* City's Supp. Br. at 3 (stating that the plaintiffs have foregone their opportunity for appellate review, and that "[i]t is therefore no longer possible for the federal court to retain jurisdiction while awaiting the outcome of a state proceeding. . . ."). Thus, there has not been, and there could not have been, ongoing legal activity at the state level since prior to the time Goodman and O'Neill brought this case.

The district court agreed with the plaintiffs that the City had deprived them of their due process rights and entered summary judgment in their favor. The City has appealed that decision.

II.

Like the majority, I recognize that the abstention question this case presents is an open one. The Supreme Court has not provided an answer, and the courts of appeals have reached conflicting results. *Compare Allegheny Corp. v. Pomeroy,* 898 F.2d 1314 (8th Cir. 1990) (agreeing with the majority) with *Thomas v. Texas State Board of Medical Examiners,* 807 F.2d 453 (5th Cir. 1987) (agreeing with me). The majority concludes that the district court abused its discretion by failing to abstain under *Younger v. Harris,* 401 U.S. 37 (1971), and the cases following and extending *Younger's* rationale. I disagree.

A.

In *Younger, supra,* the Supreme Court held that absent extraordinary circumstances, federal courts should abstain from

enjoining ongoing state criminal prosecutions. The decision rested on several grounds. The first was the "basic doctrine of equity jurisprudence that courts of equity should not act, and particularly should not act to restrain a criminal prosecution, when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief." *Younger,* 401 U.S. at 43-44. Clearly, this principle has no relevance here. Goodman and O'Neill have never been subject to anything resembling a criminal prosecution. Additionally, there is no ongoing state proceeding to enjoin. And lastly, because the plaintiffs cannot return to the BAA administrative process, they have no means of seeking adequate relief for their alleged constitutional injury through alternative legal avenues.

However, as the Court has recognized in extending *Younger* abstention beyond the context of criminal prosecutions, there is more to this doctrine than "the accepted rule that equity will not enjoin the prosecution of a crime." *Trainor v. Hernandez,* 431 U.S. 434, 441 (1977). The *Younger* Court also "voiced a 'more vital consideration,' namely, that in a union where both the States and the Federal Government are sovereign entities, there are basic concerns of federalism which counsel against interference by federal courts, through injunction or otherwise, with legitimate state functions, particularly with the operation of state courts." *Trainor,* 431 U.S. at 441 (citation omitted). These somewhat ill-defined but significant considerations of comity and federalism are the ones on which the majority relies in reaching its conclusion. In my view, however, this case does not implicate such concerns to the extent necessary to justify a decision mandating abstention under the *Younger* doctrine.

The most significant and frequently cited reason federal courts have articulated for abstaining under *Younger* has been the

importance of not interfering with state proceedings. *See, e.g., Middlesex County Ethics Comm. v. Garden State Bar Ass'n,* 457 U.S. 423, 431 (1982) (stating that *Younger* and its progeny "espouse a strong policy against interference with pending state judicial proceedings"); *Trainor,* 431 U.S. at 445-46 (applying *Younger* abstention to avoid "interrupting [state] enforcement proceedings pending decision of the federal court" and the "disruption of suits by the State in its sovereign capacity"). It is important, we have repeatedly stated, to keep clear of pending state cases. *E.g., Coruzzi v. New Jersey,* 705 F.2d 688, 690 (1983) ("The *Younger* abstention doctrine rests on the strong federal policy on noninterference with pending state judicial proceedings.") For this reason, "[a] federal court may consider *Younger* abstention when the requested equitable relief would constitute federal interference in state judicial or quasi-judicial proceedings." *Marks v. Stinson,* 19 F.3d at 882 (citing *Middlesex County Ethics Comm.,* 457 U.S. at 431, and *Huffman v. Pursue, Ltd.,* 420 U.S. 592, 599-600 (1975)). But where such interference will not occur, "the principles of comity underlying *Younger* abstention are not implicated." *Id.* (quoting *Gwynedd Properties, Inc. v. Lower Gwynedd Township,* 970 F.2d 1195, 1201 (3d Cir. 1992)). As the Supreme Court put it in *Steffel v. Thompson,* 415 U.S. 452, 462 (1974), "the relevant principles of equity, comity, and federalism 'have little force in the absence of a pending state proceeding.' " In such circumstances, the Court explained, a federal court can exercise its given jurisdiction without creating duplicative legal proceedings or disrupting the state system; nor could a decision allowing the federal suit to go forward "be interpreted as reflecting negatively upon the state court's ability to enforce constitutional principles." *Id.*

Here, once again, there was no pending state proceeding when Goodman and O'Neill initiated their federal suit. Therefore, there

was nothing with which the district court could have interfered by exercising jurisdiction over the case. Indeed, the court did exercise its jurisdiction in reaching the merits of the plaintiffs' claims, and no such interference took place. Because the BAA process was over, it could not have been disrupted. Even had the district court made a conscious and determined effort to hinder the state from pursuing its important interests or demonstrating its ability to recognize and protect federal rights, it could not have done so.

"*Younger* does not require federal plaintiffs to exhaust their appellate remedies *unless the relief being sought from the federal court involves disruption of the state's judicial process.*" *Marks*, 19 F.3d at 884 (emphasis added). No such disruption is possible here. The majority, nonetheless, concludes that abstention is not only appropriate, but that by exercising its Jurisdiction, the district court committed an abuse of discretion.

The *Younger* doctrine is also said to serve the interests of comity and federalism by preventing federal courts from protecting any doubt that state courts can and will protect federal rights. *See, e.g., Trainor*, 431 U.S. at 446 (basing decision to abstain on the desire to avoid disrupting state suits "combined with the negative reflection on the State's ability to adjudicate federal claims that occurs whenever a federal court enjoins a pending state proceeding"). According to the majority, this consideration supports its conclusion that abstention is required here. It believes that by exercising jurisdiction over Goodman and O'Neill's § 1983 suit, the district court did in fact cast an "aspersion on the capabilities and good-faith" of the state system. Maj. Op. at 12 (quoting *Huffman*, 420 U.S. at 608). At least, the majority reasons, the insult was just as disparaging here as it would have been if the plaintiffs had commenced their federal action after losing in the Pennsylvania Court of Common Pleas. Once again, I disagree.

Appendix B

Goodman and O'Neill have alleged that the BAA examiners presiding over their administrative hearings made decisions which resulted in a violation of their Fourteenth Amendment rights. Instead of bringing an appeal before other administrative officials — who, like the original examiners, are not attorneys and are not in the business of adjudicating § 1983 cases — the plaintiffs went to federal court. When they did so, they had never been before a state tribunal, nor had they ever had direct access to a state tribunal, that was competent to hear their federal claims. Unlike judges in state trial courts, the officials who administer BAA proceedings (at both the hearing and appellate stages) cannot, as a practical or a legal matter, decide whether the City should be held liable for a deprivation of the plaintiffs' constitutional rights. That is a complicated question over which Article III judges have disagreed in this case. State trial courts have concurrent jurisdiction over § 1983 suits, and Pennsylvania's judges are perfectly capable of handling them. The BAA, in contrast, is not even a court. The officials presiding over its hearings and appeals are not attorneys. They do not possess either the training or the resources to adjudicate § 1983 suits. Even if those limitations did not exist, the informal, streamlined procedural rules that govern BAA proceedings would prevent agency officials from performing this challenging job adequately. is it really such an insult to the state system to allow individuals allegedly deprived of constitutional rights at the first stage of such an administrative process to bring their § 1983 suit in federal court, rather than first to proceed with an administrative appeal and then to pursue relief through the state courts?

The majority answers affirmatively. The aspersion cast by a failure to abstain here, it states, would be equal in magnitude to that cast by permitting plaintiffs to go forward with federal actions after losing in state trial court. But by not abstaining here, the district

court did not displace a state court of appeals. It displaced a BAA parking appeals panel. Would we actually offend Pennsylvania by allowing § 1983 claimants to prefer a federal district court to the BAA? Would the State even defend its agency's legal or practical ability to handle such a case? Of course not. When the plaintiffs suffered their alleged constitutional injury at their BAA hearings, they had a choice: they could appeal within the agency or they could bring suit in federal court. The decision they made, in my view, does not disparage the good faith or the abilities of either BAA administrators or the state courts. And I believe that Pennsylvania would agree; the Commonwealth is not so unrealistic or over-sensitive as the majority's argument might suggest.

So, in my view, the district court neither interfered with nor insulted the state system when it exercised its jurisdiction over this case, and those principal values of comity and federalism that *Younger* abstention serves are not significantly (or, arguably, even remotely) advanced by today's decision.

The majority, however, lists several additional comity concerns. It points out that if we failed to require abstention under the circumstances of this case, state courts would not be able to decide the constitutional issues that arise in disputes over which they have jurisdiction. State courts would also lose the opportunity to construe state laws in a way which would make the resolution of federal constitutional questions unnecessary. And finally, the majority reasons, it is better to let state courts determine when the state must alter its practices to conform to the requirements of the U.S. Constitution; that way, the "friction" and resentment following federal decisions announcing such a mandate can be avoided, and the interests of comity are furthered.

I agree that if district courts exercise their jurisdiction over § 1983 suits brought after administrative decisions subject to eventual state judicial review, state courts would not get the opportunity to make preliminary determinations of state and (when necessary) federal law.[4] However, if these comity concerns were sufficient to require the abdication of federal judicial responsibility to hear § 1983 cases, then we would require plaintiffs to exhaust their available state remedies before bringing such suits in federal court. Of course, under the Supreme Court's holdings in *Patsy v. Florida Board of Regents*, 457 U.S. 496 (1982), and *Monroe v. Pape*, 365 U.S. 167 (1961), that is not necessary. Section 1983 plaintiffs may forego opportunities to seek recourse through state administrative and judicial processes and elect to bring their federal claims, in the first instance, in federal court. When they do so, as is often the case, state courts do not get the opportunity to decide the state and federal law questions that these disputes present. The very same comity concerns that the majority relies on here give way to the overriding federal interest in adjudicating suits alleging a violation of federally protected rights. The additional comity concerns the majority mentions are no more persuasive here than they were in *Patsy,* where the Supreme Court looked past them in holding that § 1983 plaintiffs need not exhaust their administrative remedies before proceeding in federal court. *See Patsy*, 457 U.S. at 532 33 (Powell, J., dissenting) (defending the exhaustion requirement as promoting the principles of comity recognized in *Younger* and criticizing the Court's decision as forsaking such considerations).

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4. This case does not involve any difficult and unresolved issues of state law that, depending on their resolution, might affect or make unnecessary our treatment of the federal questions it presents. If it did. we might properly abstain under *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496 (1941). The majority does not suggest that *Pullman* abstention would be appropriate here.

Appendix B

In *Marks v. Stinson,* we recognized that "*Younger* principles must be applied in a manner consistent with [the] well-established proposition" set forth in *Patsy. Marks,* 19 F.3d at 882. Unlike the plaintiff in *Patsy,* however, Goodman and O'Neill had already been through one stage of the state administrative process when they commenced their suit in federal court. The majority believes that once plaintiffs initiate BAA proceedings, they cannot be permitted to leave the state system without exhausting their appellate remedies. I agree that *Patsy* does not control here. However, today's decision strikes me as more about exhaustion than abstention. In my view, this case is far closer to *Patsy* than it is to *Huffman v. Pursue, Ltd.*, 457 U.S. 592 (1975), and the other cases requiring *Younger* abstention.

In *Huffman, supra,* the sheriff and prosecuting attorney of a county in Ohio brought suit under a public nuisance statute against the owner of a theater that showed pornographic films. Following trial, the state court ruled in Ohio's favor. It issued a judgment ordering the theater to close for one year and authorizing the state to seize and sell property used in the theater's operation. The next day, rather than filing an appeal, the theater owner brought suit in federal district court alleging that Ohio's application of its nuisance law was unconstitutional and asking for an injunction prohibiting the enforcement of the state trial court's judgment.

The Supreme Court held that the district court should have abstained under *Younger.* In reaching that conclusion, it relied heavily on "the policy of noninterference" with cases that are pending before state courts. *Huffman*, 422 U.S. at 599-605. The theater owner had argued that after the state trial court entered its judgment, there was no ongoing proceeding to disrupt. The Supreme Court rejected that position. *Huffman*, 420 U.S. at 608 ("[A] necessary concomitant of *Younger* is that a party in

appellee's posture must exhaust state appellate remedies before seeking relief in the District Court. . . ."). Its reasons for doing so, which are not applicable here, fully convey the differences between *Huffman* and the case before us. The Court stated:

> Virtually all of the evils at which *Younger* is directed would inhere in federal intervention prior to completion of state appellate proceedings, just as surely as they would if such intervention occurred at or before trial. Intervention at the later stage is if anything more duplicative, since an entire trial has already taken place, and it is also a direct aspersion on the capabilities and good faith of the state appellate courts. Nor, in these state-initiated nuisance proceedings, is federal intervention at the appellate stage any the less a disruption of the State's efforts to protect interests which it deems important. Indeed, it is likely to be even more disruptive and offensive because the State has already won a *nisi prius* determination that its valid policies are being violated in a fashion which justifies judicial abatement.
>
> Federal post-trial intervention, in a fashion designed to annul the results of a state trial, also deprives the states of a function which quite legitimately is left to them, that of overseeing trial court dispositions of constitutional issues which arise in civil litigation over which they have jurisdiction. We think this consideration to be of some importance because it is typically

> a judicial system's appellate courts which are by their nature a litigant's most appropriate forum for the resolution of constitutional contentions.

Huffman, 420 U.S. at 608-09. Again, virtually none of those justifications for abstention apply here. Federal adjudication of the plaintiffs' § 1983 claims would not be duplicative of the BAA hearings; the hearing examiners could not and did not address the constitutional implications of their decisions. As I have already explained, displacing a parking appeals panel is entirely different than displacing a state appellate court, and the former does not cast any aspersion on the good faith or abilities of state institutions. Unlike *Huffman,* in this case the district court did not disrupt a state-initiated proceeding commenced to protect interests which the state deems important. Rather, it was Goodman and O'Neill who initiated the BAA process. The agency, recall, is powerless to do so itself.) And the state action giving rise to the plaintiffs' constitutional claims has not been deemed important to the state but has instead been characterized as an unfortunate and unlawful mistake committed by individual administrative officials. Finally, while state appellate courts might provide the litigant's "most appropriate forum for the resolution of constitutional contentions", *Id.* at 609, one could hardly say the same thing about a parking appeals panel. Such a suggestion, in fact, would reflect a more insulting view of the state judiciary than any decision declining to abstain under *Younger.*

The majority also states that *Dayton Christian Schools, supra,* is more applicable here than *Patsy. See* Maj. Op. at 12 n.13. The federal plaintiff in *Patsy,* it reasons, initiated a remedial action to vindicate a wrong which had been inflicted by the State. *Dayton Christian Schools* is different, in the majority's view, because like

the case before us, it involved coercive administrative proceedings initiated by the State to enforce a violation of state law. But Goodman and O'Neill's § 1983 suit *is* remedial — not, as the majority suggests, purely defensive. The plaintiffs claim that the BAA hearing examiners violated their due process rights in deciding to adjudicate their older tickets, and they have sought relief for that wrong in federal court. True, they could have pursued the same remedy through an administrative appeal and then through the state court system. Under the principles of *Patsy,* however, which I believe are applicable here, they need not have exhausted their state administrative and judicial options. Additionally, unlike the federal plaintiffs in cases like *Huffman Dayton Christian Schools, Juidice v. Vail,* 430 U.S. 327 (1977), *Trainor v. Hernandez,* 431 U.S. 434 (1977), *Moore v. Sims,* 442 U.S. 415 (1979), and *Middlesex County Ethics Comm.,* 457 U.S. 423 (1982), Goodman and O'Neill have never been targets of state-initiated legal proceedings. While the majority states that the BAA process was coercive, the fact is that the BAA cannot adjudicate tickets unless recipients request a hearing. Again, the agency does not have the legal power to initiate its own process, and it cannot coercively subject anyone to its authority. Thus, Goodman and O'Neill have not asked the district court for protection from the state's independent efforts to enforce its laws through an administrative proceeding directed against them. Rather, after allegedly suffering a constitutional injury at the hands of state officials presiding over an administrative process that the plaintiffs initiated for their own benefit, they turned to the federal district court for relief instead of pursuing administrative and then judicial appeals within the state system. In these circumstances, it requires only the smallest extension of *Patsy* — as compared to a far greater and less reasonable extrapolation of *Huffman, Dayton Christian Schools,* and other decisions requiring *Younger* abstention — to permit § 1983 plaintiffs to go forward with their claims in federal court.

Appendix B

Our prior decision in *Kentucky West Virginia Gas Co. v. Pennsylvania Public Utility Comm'n,* 791 F.2d 1111 (3d Cir. 1986), supports this view. *Kentucky West* involved a dispute between two gas companies and the Pennsylvania Public Utilities Commission ("PUC"). The companies initiated an administrative proceeding before the PUC seeking approval of a proposed rate increase. The PUC denied their request, and the companies challenged that, determination in state court. Shortly thereafter, they filed suit in federal district court seeking declaratory and injunctive relief. The federal complaint alleged that Pennsylvania's regulatory scheme and the PUCs decision were either preempted by federal statute or unconstitutional under the commerce and equal protection clauses. The district court dismissed the companies' suit under *Burford* and *Younger* abstention. We reversed, stating:

> "In the typical *Younger* case, the federal plaintiff is a defendant in ongoing or threatened state court proceedings seeking to enjoin a continuation of those state proceedings." *Crawley v. Hamilton County Comm'rs,* 744 F.2d 28, 30 (3d Cir. 1984). In this case, on the other hand, the federal plaintiffs — [the gas companies] — are also the state plaintiffs. Moreover, they are not seeking to enjoin any state judicial proceeding; instead, they simply desire to litigate what is admittedly a federal question in a federal court, having agreed to dismiss their pending state appeal if the district court assumes jurisdiction over the merits of their complaint.
>
> Under the circumstances, then, we believe

> that the balance of state and federal interests tips decidedly away from abstention under *Younger*. . . . To deny [the gas companies] access to a federal forum simply because of their pending state appeal would be at odds with a fundamental premise of our federal judicial system: that is, "that where Congress has granted concurrent jurisdiction, a plaintiff is free to bring suit in both the state and federal forums for the same cause of action." [*New Jersey Educ. Ass'n v. Burke*, 579 F.2d 764, 769 (3d Cir. 1978).]

Kentucky West, 791 F.2d at 1117. In *Marks v. Stinson*, we recently reaffirmed the principles set forth in *Kentucky* West in holding that *Younger* abstention was not appropriate where the exercise of federal jurisdiction would not interfere with parallel state proceedings. *Marks*, 19 F.3d at 885. The plaintiffs in this case occupy the same position as the gas companies in *Kentucky West* they have never been defendants in state administrative or judicial proceedings; rather, after allegedly suffering a deprivation of their federal rights as a result of a state administrative decision, they chose to seek relief in federal court, indeed, the argument for abstention was stronger in *Kentucky West* and *Marks* than it is here, as this case does not raise real concerns of interrupting ongoing litigation in state courts involving the same subject matter giving rise to the federal suit. Our reasons for not abstaining previously, therefore, seem even more compelling in this case.

The First Circuit's decision in *Kercado-Melendez v. Aponte-Roque*, 829 F.2d 255 (lst Cir. 1987), also counsels against a decision mandating abstention. The plaintiff in that case, Kercado, worked for the Puerto Rico Department of Public Instruction

("DPI") as a school district superintendent. The Secretary of the DPI charged Kercado with incompetence and improper conduct. After Kercado appeared at an informal DPI hearing at which the charges against her were addressed, she received an order dismissing her from her employment. She had the option to appeal her termination within the DPI administrative appeals process but declined to do so. Instead, Kercado filed a § 1983 suit in federal court alleging that she had been fired as a result of her political affiliations in violation of her First Amendment rights, and further that the state had deprived her of due process by failing to provide her with a pre-termination hearing. On appeal, the Secretary of the DPI argued "that because Kercado could have appealed the dismissal to the DPI Board of Appeals, the district court should have abstained and thereby forced Kercado to litigate her claims in a Puerto Rico forum." *Kercado-Melendez,* 829 F.2d at 259. "In effect," the court continued, the Secretary was arguing "that Kercado should not have been permitted to bring a section 1983 suit in federal court because of the availability of an appeal within the Puerto Rico administrative and judicial apparatus." *Id.* The majority takes precisely the same position here.

The First Circuit rejected the Secretary's argument. It explained that in *Kercado-Melendez,* unlike *Dayton Christian Schools,*

> the administrative proceeding is remedial rather than coercive. *The administrative appeal process could be triggered only on Kercado's initiative if she wished to pursue her remedies within the Puerto Rico administrative framework. Patsy* holds that she was not *required to do so.*

Id. at 260 (emphasis added). The administrative process here, like

the ones in *Kercado-Melendez* and *Patsy* and unlike the one in *Dayton Christian Schools.*, could be triggered only on the plaintiffs' initiative. The BAA was powerless to bring Goodman and O'Neill before it, and it was powerless to compel them to challenge the hearing examiners' decisions before a parking appeals panel. Accordingly, I agree with the First Circuit's conclusion that the principles of *Patsy* are more applicable than those of *Dayton Christian Schools* or other decisions requiring *Younger* abstention. As *Kercado-Melendez* explains, we should not fail "to recognize that there is a significant difference between a civil rights plaintiff who seeks to use the federal courts to stop or nullify an ongoing state proceeding in which she is a defendant, and a civil rights plaintiff who has an option to initiate a state proceeding to remedy a constitutional wrong perpetrated by a state actor." *Kercado-Melendez.* 829 F.2d at 261.

B.

In reaching its conclusion that *Younger* abstention is mandated here, the majority seeks to protect and promote principles of comity and federalism. I do not agree with its assessment of the harm those interests would suffer if we permitted the district court to exercise its jurisdiction. Additionally, although the majority barely acknowledges this point, there are other highly significant countervailing interests at stake in suits brought under § 1983 which merit serious consideration in any discussion of *Younger* abstention. The majority's analysis overlooks this second side of the balance (after overestimating the first). In doing so, it produces a result with deeply troubling implications.

When it enacted § 1 of the Civil Rights Act of 1871 (now codified as 42 U.S.C. § 1983), "Congress intended to 'throw open the doors of the United States courts' to individuals who were

threatened with, or who had suffered, the deprivation of constitutional rights, and to provide these individuals immediate access to the federal courts notwithstanding any provision of state law to the contrary." *Patsy,* 457 U.S. at 504 (citation omitted) (quoting legislative history). Thus, as the Court explained in *Mitchum v. Foster,* 407 U.S. 225, 242 (1972): "The very purpose of 1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights. . . ." In enacting legislation to make the federal courts "the *primary* and powerful reliances" for vindicating federal rights under § 1983, *Steffel,* 415 U.S. at 464 (emphasis in original) , Congress was fully aware of and undeterred by competing concerns of comity and federalism. As the Court has stated, "Congress clearly conceived that it was altering the relationship between the States and the Nation with respect to the protection of federally created rights." *Mitchum,* 407 U.S. at 242. It did so, nonetheless, to create "a uniquely federal remedy against incursions under the claimed authority of state law upon rights secured by the Constitution and the laws of the Nation." *Id.* at 239.

Today, the majority holds that individuals allegedly deprived of constitutional rights during the adjudication of their claims before a state agency cannot pursue a § 1983 claim in federal court even after the administrative process is no longer pending, and even when they no longer have any recourse within the state system.[5] Under the majority's ruling, the only federal forum such

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5. I agree with the majority's point that the plaintiffs lost their opportunity to pursue administrative and then judicial appeals in the state system as a result of their own conduct. In my view, however, *Younger* abstention is not a device to keep litigants from choosing a federal forum when we feel their cases are better suited to the state agencies or courts. Rather, it is a principle of restraint exercised only where the exercise of jurisdiction would inflict overriding harm to competing values of comity

(Cont'd)

plaintiffs will ever stand a chance of reaching is the United States Supreme Court; and for a number of easily appreciated reasons, that chance is remote. By so drastically limiting (if not, for all practical purposes, foreclosing) access to the federal courts, today's decision runs directly counter to the purposes Congress sought to achieve in enacting the civil rights legislation under which the plaintiffs brought this suit.

Thus, in concluding that the district court committed an abuse of discretion by exercising its jurisdiction, the majority not only overstates the extent to which comity and federalism concerns are implicated in this case; in addition, and of potentially greater significance, its analysis fails to take into account the vital federal and individual interests at stake in the adjudication of any case brought under § 1983.

III.

Because I disagree with the majority's conclusion that the district court abused its discretion by failing to abstain under *Younger,* I will comment very briefly on the merits of the plaintiffs claims. In my view, there are none.

First, the City is the only remaining defendant in the case, and the plaintiffs have not established that the alleged violation of their constitutional rights occurred as a result of an official custom, practice, or policy under the standard for municipal liability set

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(Cont'd)

and federalism. Abstention serves to protect state interests and maintain a strong, respectful relationship between the governments making up the federal system — not to deter prospective plaintiffs from attempting to vindicate their federal rights in federal court.

forth in *Monell v. Dept. of Social Services*, 436 U.S. 658 (1978), and the related line of cases. In fact, the City adopted an ordinance expressly prohibiting the decision that gave rise to the plaintiffs' constitutional claims. The officials who presided over Goodman's and O'Neill's hearings overlooked that provision of the City Code, but Philadelphia cannot be held liable for those mistakes.[6]

Second, I believe that the district court erred in concluding that Goodman and O'Neill were deprived of their property without due process of law. The City committed such a violation, it reasoned, by failing to notify the plaintiffs that if they failed to appear before the Traffic Court prior to a certain date, their only recourse would be to the BAA.

The BAA is an administrative agency that does not even have the power to enter a civil judgment. The Traffic Court, in contrast, rendered decisions determining criminal guilt. Accordingly, and

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6. The plaintiffs argue that even if the hearing examiners had complied with the ordinance and refrained from adjudicating their older tickets, the BAA's utilization of a "Code 41" mechanism would have required the agency to make the same determinations of liability. First, even if Code 41 was relevant to resolving the substantive issues this case presents, factual disputes over this mechanisms effect and existence at the time of Goodman's and O'Neill's hearings would preclude a grant of summary judgment. Second, and more importantly, Code 41 is not important here because the BAA did not employ it. Goodman and O'Neill are attempting to establish municipal liability based on a policy that the City never followed in its dealings with them. Their belief that the BAA would have made Code 41 determinations, and that when that occurred, they would have suffered the same alleged deprivation of due process, does not give them a viable claim against the City. The official conduct that resulted in the constitutional harm the plaintiffs allegedly suffered was the hearing examiners' erroneous decisions to rule on their older tickets — not the Code 41 mechanism. Under justiciability principles and the standard for municipal liability in § 1983 cases, Goodman and O'Neill cannot pursue a claim based on a rule or policy that never affected them.

appropriately, the BAA does not provide ticket recipients with all of the procedural protections and defenses that they could have relied upon in the Traffic Court. However, nobody has suggested that the process the BAA does provide in adjudicating ticket challenges fails to meet constitutional standards. Goodman and O'Neill only argue, and the district court only held, that before the City switched the forum in which ticket recipients would have to proceed, it was required to provide notice.

I would not accept that argument (and, I gather, neither would the majority). The City has replaced one constitutionally adequate process with another. True, someone who surely would have escaped criminal liability in Traffic Court might not prevail at the BAA. But everyone who participates in BAA proceedings receives at least the process that is due before the City takes their property. The City did not warn Goodman and O'Neill that they might lose their access to the Traffic Court; it did, however, provide them with notice of the parking charges against them and a meaningful opportunity to respond to those charges before reaching a decision that they would have to pay their fines. Given these facts, the plaintiffs have at most suffered a deprivation of *process* without due process — not a deprivation of *property* without due process. That does not constitute a violation of their Fourteenth Amendment rights. The Constitution does not require notice and an opportunity to be heard before all rule changes that might effect an outcome. So long as the new rules are adequate under due process standards — and, again, no one has suggested that in this case, they are not — the Fourteenth Amendment is satisfied. *See Sill v. Pennsylvania State Univ.*, 462 F.2d 463, 469 (3d Cir. 1972) (rejecting argument that the University violated students' due process rights by subjecting them to disciplinary proceedings before a specially constituted panel that employed its own procedural rules); *Crane v. Hahlo*, 258 U.S. 142, 147 (1928) ("No one has a vested right in any given mode of procedure; and so long

as a substantial and efficient remedy remains or is provided due process of law is not denied by a legislative change." (citations omitted)); *see also* Maj. Op. at 5 n.4[7]

Thus, in my view, while Goodman and O'Neill may have derived certain advantages from not paying their parking tickets, *see* Marion Wink, *Women Who Love Men Who Don't Pay Their Parking Tickets,* Cosmopolitan, April 1993, at 136, a viable § 1983 suit is not among them. I would therefore reverse the district court's decision and remand the case so that judgment could be entered in favor of Philadelphia.

IV.

Justice Frankfurter believed that "petty cases," even more than hard cases, are "calculated to make bad law." *United States v. Rabinowitz,* 339 U.S. 56, 68 (1950) (Frankfurter, J., dissenting). "The impact of a sordid little case," he explained, "is apt to obscure the implications of the generalization to which the case gives rise." *Id.* This easily qualifies as a petty case. It is a dispute about a few parking tickets. Collectively, the plaintiffs' financial stake in the outcome is $218.00. The generalization to which today's decision gives rise, however, is an important and, in my view, misguided one.

The majority does not and cannot limit its holding to meritless claims over small stakes. Highly significant constitutional

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7. The City makes the additional argument that under *Parratt v. Taylor*, 451 U.S. 527 (1981), the availability of post-deprivation opportunities to challenge the hearing examiners' erroneous decisions provided the plaintiffs with constitutionally adequate process. Because the BAA did provide the plaintiffs with all the process that was due prior to rendering its decisions, however, *Parratt* and other cases addressing the sufficiency of post-deprivation remedies are irrelevant.

questions do arise in the context of administrative proceedings addressing seemingly minor issues of purely local concern. *Yick Wo v. Hopkins,* 118 U.S. 356 (1886), is one example that comes to mind. The plaintiffs in *Yick Wo* challenged a facially innocuous municipal ordinance that empowered a committee of city officials to determine who could and could not operate laundry businesses. The case elicited one of the Supreme Court's earliest and most significant expositions of the Fourteenth Amendment's guarantee that no state shall deny to any person the equal protection of the laws. Needless to say, the scope and importance of issues addressed in administrative proceedings and consequently, the significance of the legal questions that arise from agency decision-making has steadily and dramatically increased during the years since *Yick Wo.*

Even in cases such as the one before us, where the underlying constitutional claims are not so gripping, the rule the majority announces today does not reflect an appropriate balance between concerns of comity and federalism, on the one hand, and the values served by the federal courts meeting their responsibility to decide cases over which they have jurisdiction, on the other — especially when that jurisdiction has been conferred by legislation intended to provide plaintiffs alleging that they have been deprived of federal rights under color of state law with direct access to a federal forum. Thus, in my view, the majority's treatment of this petty case misapprehends even the general principles of "Our Federalism" it purports to defend.

For these reasons, I respectfully dissent.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

Appendix B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 93-1378

JOHN O'NEILL; SAMUEL R. GOODMAN, on behalf of themselves and all others similarly situated

v.

CITY OF PHILADELPHIA; PHILADELPHIA PARKING AUTHORITY; OFFICE OF THE DIRECTOR OF FINANCE; BUREAU OF ADMINISTRATIVE OFFICE OF ADJUDICATION

City of Philadelphia, Office of The Director of Finance and Bureau of Administrative Adjudication,

Appellants

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civil No. 91-06759)

Present: Roth, Lewis and Garth, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel on October 28, 1993.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court

entered March 30, 1993, be, and the same is hereby vacated and the cause is remanded to the District Court with instructions to abstain under *Younger v. Harris,* 401 U.S. 37 (1971) and to dismiss the plaintiff's complaint. Costs taxed against John O'Neill and Samuel R. Goodman. All of the above in accordance with the opinion of this Court.

ATTEST:

s/ illegible
Chief Deputy Clerk

Dated: August 5, 1994

Costs taxed in favor of Appellants as follows:

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Appendix	$ 534.10
Reply Brief	$ 77.80
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Teste: s/ P. Douglas Sisk

Clerk, U.S. Court of Appeals for the Third Circuit.

APPENDIX C — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA FILED MARCH 29, 1993

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION
NO. 91-6759

JOHN O'NEILL and SAMUEL GOODMAN

v.

CITY OF PHILADELPHIA, et al.

MEMORANDUM

Dalzell, J. March 29, 1993

Plaintiffs John O'Neill and Samuel Goodman have sued to challenge the 1989 reorganization of Philadelphia's system of adjudicating parking violations. Plaintiffs in their second amended complaint name as defendants the City of Philadelphia ("City"), the Office of Philadelphia's Director of Finance (the "Office of Director of Finance"), and the Philadelphia Bureau of Administrative Adjudication ("BAA").[1]

Plaintiffs claim that the 1989 reorganization violated the constitutional prohibition against *ex post facto* legislation,

1. Although counsel for plaintiffs and defendant persist in referring to the BAA and the Office of the Director of Finance as separate defendants, it is clear they are part of the City of Philadelphia, and not separate juridical persons. In reality, therefore, there is only one defendant, the City.

plaintiffs' due process rights under the Fifth and Fourteenth Amendments of the United States Constitution, and Pennsylvania law. Messrs. O'Neill and Goodman seek restitution of all fines, costs and fees they have paid as a result of the unlawful aspects of the reorganization, as well as injunctive relief.

On October 15, 1992, we denied plaintiffs' motion for class certification. We concluded that maintaining this suit as a class action was not superior to other available methods for the fair and efficient adjudication of this controversy. We held instead that a test case would be far superior to a class action for resolution of this controversy.

Both parties have moved for summary judgment after submitting a stipulation of facts. After carefully sifting through plaintiffs' many claims, we have found one nugget that warrants granting relief to plaintiffs, and to that extent we will grant plaintiffs' motion for summary judgment and deny defendant's.

I. *Factual Background*

The underlying facts of this suit are in all material respects uncontroverted.

The essence of O'Neill and Goodman's second amended complaint is that the City violated their constitutional rights when a Hearing Examiner of the BAA rather than the Philadelphia Traffic Court (the "Traffic Court") adjudicated parking tickets they received before June 1, 1989. A brief history will highlight the significance of this change and how it came about.

The Pennsylvania Constitution, Article 5, Schedule 16(s), authorized the creation of traffic courts throughout the

Commonwealth. 42 Pa. Cons. Stat. § 1321 created the Philadelphia Traffic Court. Under 42 Pa. Cons. Stat. §1302, the Pennsylvania General Assembly assigned Traffic Court exclusive jurisdiction over all summary offenses arising under Title 75 (Motor Vehicles) and under Local Ordinances enacted pursuant to Title 75. The City enacted Title 12 of the Philadelphia Code, which established traffic control rules, including parking violations, and provided for enforcement.

In 1982, the Pennsylvania General Assembly authorized the Philadelphia Parking Authority to establish on-street parking regulations and create a comprehensive system of administration and enforcement. Pursuant to this enabling legislation, seven years later the Philadelphia City Council (the "City Council") adopted Bill No. 350 (the "Ordinance") on March 16, 1989. The Mayor signed the Bill No. 350 six days later. By its terms the Ordinance adds a new Chapter, 12-2800, *et seq.*, entitled "Administrative Adjudication of Parking Violations," amending Title 12 of The Philadelphia Code. The Ordinance became effective on June 1, 1989, and granted the Director of Finance authority to adopt regulations for the hearing and determination of parking violations, and the imposition of civil penalties (12-2802[1]). The present action relates only to the retrospective application of this Ordinance.

To understand plaintiffs' challenges to the retrospective application of the Ordinance, it is illuminating to examine briefly the process of adjudicating parking tickets that existed before the Ordinance became effective. Between 1982 and June 1, 1989, original jurisdiction lay with the Traffic Court and dissatisfied defendants appealed its decisions to the Court of Common Pleas of Philadelphia County (Exhibit 13, pp. 19-20). During that time, the Philadelphia Police Department brought tickets to the attention of the Traffic Court in the form of an information. The Traffic Court

filed the information and generated a summons, ordering individuals to appear at trials to defend themselves on the criminal offense for all violations that remained unpaid after eight days (id. p. 21). If the summons did not elicit a response, the Traffic Court issued a warrant for the individual's arrest (*id.* at 25).

The Ordinance created a period of dual jurisdiction. A person who had received a parking ticket, citation or summons from the Traffic Court between October 2, 1987 and June 1, 1989, could choose to proceed either in Traffic Court or the BAA (122807[8]).[2] This option was available until "the Fall of 1990"[3], when the Traffic Court stopped hearing parking ticket eases.

At this point we turn to the events that befell our plaintiffs, Goodman and O'Neill. Prior to June 1, 1989, they each received parking tickets in the City as follows:

Goodman	O'Neill
May 16, 1989	May 1, 1989
December 7, 1988	October 10, 1988
December 11, 1987	November 28, 1987
December 11, 1987	
February 26, 1987	

2. Individuals who received tickets prior to October 1, 1987 were automatically eliminated from the computer system that recorded delinquent parking violations because they presumptively qualified for the statute of limitations defense.

3. The parties' stipulation, which is not an exemplar of lawyers' precision, does not advise us of the exact date.

Neither paid the fines, and in accordance with the procedures described above, the Traffic Court lodged an information and issued a summons. A summons was served on each stating the fines and penalties for the offense, with a notice to appear in Traffic Court on a date certain. Neither Goodman nor O'Neill appeared for the scheduled hearing, and the Traffic Court periodically sent notices to them seeking payment (*see* Exhibit 6 and Stipulation of Facts ¶ 21).

In November of 1989, Goodman and O'Neill each received a "Violation Warning Notice" from the Office of the Director of Finance (Exhibit 4). This notice informed them that they could elect to appear before the Traffic Court, as a criminal matter, or proceed in the Director of Finance's Bureau of Administrative Adjudication as a civil action.[4] One of the many disputes between the parties centers on this notice. Plaintiffs contend that the notice the Director of Finance sent was legally insufficient to enable the recipient to make an intelligent waiver of his or her right to appear before the Traffic Court.

Goodman and O'Neill took no action in response to this notice. As a result, each received an "Order of Default" which told them that the failure to pay the stated amount of fines and penalties "could result in the City taking additional legal actions against [them], which could have an adverse effect on [their] property rights, among other consequences" (Exhibit 11).

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4. Ordinance 350 altered the treatment of parking violations from criminal to civil violations. Until March 7, 1989, the Philadelphia Traffic Court Rules governed all parking offenses filed with the Traffic Court. Its provisions entitled a defendant to three rights that are not provided in a BAA hearing: a disposition could not be made without the personal appearance in Traffic Court of the alleged parking violator (*see* Exhibit 5, "Philadelphia Traffic Court Rules," Rule 5.1 and Rule 6.10); the defendant's guilt had to be proved beyond a reasonable doubt; and a two-year statute of limitations applied.

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On March 4, 1991, Goodman requested a hearing before the BAA to adjudicate a ticket he received on February 4, 1991. The BAA responded by scheduling a hearing for March 18, 1991, and listed six outstanding violations for disposition at that hearing. At the March 18 hearing, the BAA listed four additional tickets, including violations that had occurred before June 1, 1989 (Exhibit 7 and Stipulation of Facts ¶ 15). Counsel for Goodman appeared at the hearing and objected to including tickets issued before June 1, 1989, on the basis that they were within the Traffic Court's exclusive jurisdiction and that Goodman did not consent to the BAA's jurisdiction. Moreover, Goodman's counsel raised the statute of limitations defense as to all the tickets that were more than two years old.[5]

The Hearing Examiner overruled the objections', apparently stating that the BAA had jurisdiction regardless of consent, and that the statute of limitations defense only applied in Traffic Court which treated parking violations as criminal offenses (*see* Exhibit A, Affidavit of Vincent J. Ziccardi ¶¶ 5-9 attached to Plaintiffs' Memorandum in Support of Motion for Summary Judgment). The Hearing Examiner determined liability on the ten tickets, resulting in the dismissal or reduction of some, and assessed a total fine of $247.10. This fine included $173.00 for tickets issued before June 1, 1989. Goodman has paid his fines.

When O'Neill tried to have three parking tickets listed for

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5. The City asserts that anyone who did not qualify for the statute of limitations defense as of June 1, 1989, lost their right to assert it before the BAA. Since none of Goodman's tickets qualified for the statute of limitations on that date, they remained on his traffic violation record. It is Goodman's position that the relevant date for determining if the City's actions are time barred is the date that he appeared for a hearing regardless if that occurred after June 1, 1989. It is not necessary for us to resolve the merits of this particular dispute to reach our holding.

disposition in the Traffic Court in April of 1991, the court informed him that it no longer heard parking violation cases (Stipulation of Facts ¶ 18). Subsequently, O'Neill requested and the BAA granted a hearing for August 30, 1991 (Stipulation of Facts ¶¶ 20-21). O'Neill attended the hearing with his counsel present, raised the same objections as Goodman, and experienced the same lack of success. The Chief Hearing Examiner determined liability, and reduced the assessment of fines to $45.00. To date, O'Neill has not paid any of his fines.

On October 30, 1991, plaintiffs filed this action asserting violation of their rights under the United States Constitution. They also invoke their rights under 42 U.S.C. §1983 and claim violations of Pennsylvania state law.

Specifically, plaintiffs' second amended complaint asserts five counts. The First Count avers that the City violated plaintiffs' due process rights, as guaranteed by the Fifth and Fourteenth Amendments of the United States Constitution, because, at a minimum, the hearings before the BAA should have entitled plaintiffs to all the rights available in a pre-organization Traffic Court proceeding.

The Second Count claims that the City violated plaintiffs' federal due process rights, as well as the United States Constitution's limitation on *ex post facto* legislation set forth in art. I, §9, cl. 3 and art. I, §10, cl. 1. Plaintiffs allege that the City violated these provisions of the federal Constitution primarily because the BAA did not obtain the plaintiffs' consent to its jurisdiction, as required by the Ordinance, and nevertheless (1) applied the laws and regulations governing hearings in effect under the 1989 amendments to violations that had occurred when exclusive jurisdiction resided in the Traffic Court, and (2) imposed

the 1989 civil burden of proof to cases that remained within the exclusive jurisdiction of the Traffic Court and, thus, entitled to the criminal burden.

The second amended complaint's Third Count alleges that the City violated state law by exceeding the authority granted by 42 Pa. Cons. Stat. §345(17) when it amended the Traffic Code by providing, in §12-2807(8), for the consent of ticket holders to retroactive application of the amended Traffic Code to pending violations cognizable in the Traffic Court. They contend that this was an unlawful extension of the BAA's subject matter jurisdiction.[6]

The Fourth Count asserts that the BAA violated the United States Constitution's limitation on *ex post facto* legislation, as founded in art. I, §9, cl. 3 and art. I, §10, cl. 1, when it unlawfully extended the applicable statute of limitations by holding proceedings on parking violations that were time barred pursuant to Pennsylvania law, 42 Pa. Cons. Stat. §5553(e). The Fourth Count further claims that these proceedings also violated 42 Pa. Cons. Stat. §5553(e) by its own terms.[7]

The Fifth Count alleges that the Ordinance, 12-2807(4), is a Bill of Attainder to the extent it subjects plaintiffs' vehicles to seizure without a hearing in violation of art. I, § 10, cl. 1 of the United States Constitution.

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6. Because plaintiffs have not pressed this argument in their motion for summary judgment, we treat this claim as withdrawn at this procedural stage.

7. Plaintiffs did not argue this portion of the Fourth Count, which alleges a pure state law violation, in their motion for summary judgment; consequently, we treat it as withdrawn for purposes of resolving the motions.

We have jurisdiction under 28 U.S.C. §1343.[8]

II. *Summary Judgment Standard*

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). An issue is "genuine" only if there is a sufficient evidentiary basis on which a reasonable jury could find for the non-moving party. *Anderson v. Liberty Lobby. Inc.*, 477 U.S. 242, 249 (1986). A factual dispute is "material" only if it might affect the outcome of the suit under governing law, *id.* at 248, and all inferences must be drawn, and all doubts resolved, in favor of the non-moving party. *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962); *Gans v. Mundy*, 762 F.2d 338, 341 (3d Cir.), *cert. denied*, 474 U.S. 1010 (1985).

On a motion for summary judgment, the moving party bears the initial burden of identifying for the Court those portions of the record that it believes demonstrate the absence of dispute as to any material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). To defeat summary judgment, the nonmoving party "may not rest upon the mere allegations or denials of tits] pleading, but [its] response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Fed.R.Civ.P. 56(e). The non-moving party must demonstrate the existence of evidence that would support a jury finding in its favor. *See Anderson*, 477 U.S. at 248-49.

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8. We decline the City's invitation to abstain from exercising jurisdiction under the principles of federalism enunciated in *Younger v. Harris*, 401 U.S. 37, 91 S. Ct. 746 (1971). *See Gwynedd Properties. Inc. v. Lower Gwynedd Township*, 970 F.2d 1195 (3d Cir. 1992).

Appendix C

As noted above, given that the parties dispute the legal consequences of admitted public acts, this case is peculiarly appropriate for resolution by summary judgment.

III. *Legal Analysis*

A. *Bill of Attainder and Ex Post Facto*

Plaintiffs' challenge to the Ordinance as an unconstitutional *ex post facto* law or a bill of attainder hinges on whether the fines and penalties it prescribes are civil or penal in nature.

In *United States v. Ward*, 448 U.S. 242, 100 S. Ct. 2636 (1980), the Supreme Court enunciated a two-prong inquiry for determining whether a penalty is civil or criminal. The first issue is whether the legislature has evinced, either expressly or impliedly, a preference for one label or the other. *Id.* at 248. Second, where the legislature has evinced an intention to create a civil penalty, a court must determine whether the statutory scheme is so punitive either in purpose or effect as to negate the legislature's intention. *Id.* at 248-49. In making the latter inquiry, "only the clearest proof could suffice to establish the unconstitutionality of a statute on such a ground." *Id.* at 249 (quoting *Flemming v. Nestor,* 363 U.S. 603, 617, 80 S. Ct. 1367, 1376 (1960)). Finally, the Supreme Court in *Ward* found the seven considerations set forth in *Kennedy v. Mendoza-Martinez,* 372 U.S. 144, 168-69, 83 S. Ct. 554,- 568-69 (1963) helpful in making the second inquiry, noting, however, that the list is neither exhaustive nor dispositive. *Ward,* 448 U.S. at 249. Those factors are

> [w]hether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment,

> whether it comes into play only on a finding of *scienter,* whether its operation will promote he traditional aims of punishment-retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned. . . .

Mendoza-Martinez, 372 U.S. at 168-69 (footnotes omitted).

In the present case, we find that City Council enacted the Ordinance unambiguously intending parking infractions to be civil rather than criminal in nature. The Ordinance added Chapter 12-2800 *et seq.* to grant to the Director of Finance authority to promulgate regulations for the hearing and determination of parking violations outside of the criminal justice system (12-2801[3]). In the preamble to the Ordinance, the City Council expressly recognized that "the current system of parking violation enforcement within the criminal justice system has resulted in the improper and inefficient allocation of parking violation enforcement responsibility . . . [and] unfairness to citizens caused by the threat and stigma of a criminal sanction" (12-2801[2]).

Specifically, the Ordinance empowered the Director of Finance to provide "for the imposition of civil penalties, costs and additional fees . . ." for parking violations in the City (12-2802[1]). Moreover, the Ordinance states that a person who admits committing a parking violation "shall . . . pay the civil fines and costs, and any additional fees as may be due for failure to answer [the summons] within the time required" (122806[3]). Finally, ¶ 12-2809, entitled "Civil Penalties and Costs", characterizes all costs and penalties prescribed under Title 12 as non-criminal.

Based on the foregoing, we conclude that the City Council explicitly intended the Ordinance to be regulatory in character and its penalties civil in nature.

Having held that the City had a manifest intent to consider penalties for parking infractions as civil and not criminal, we next turn to the second level of the *Ward* analysis, and apply the *Mendoza-Martinez* standards to aid in deciding whether the content of the Ordinance conforms with the label City Council gave it.

Unlike many penal provisions, the Ordinance does not require a showing of *scienter.* We recognize, however, as plaintiffs suggest, that the City intends a portion of the fines collected to serve as a deterrent to potential wayward parkers, a traditional purpose of criminal provisions. In *Gardner v. City of Columbus, Ohio,* 841 F.2d 1272 (6th Cir. 1988), the Sixth Circuit addressed a similar argument challenging amendments to the Columbus City Code that also changed parking violations from criminal to civil offenses. In that case, plaintiffs argued that the penalties were penal in nature because they had no relation to damage, harm or cost to the city. They therefore concluded that there could be no other purpose to which the sanction could be rationally connected, thereby violating the sixth *Mendoza- Martinez* factor.

The Sixth Circuit reasoned, and we agree, that while deterrence may be one aim of the penalties, the other goal is to defray the cost of providing and regulating parking on urban streets. The Sixth Circuit concluded that "the fines are part of a comprehensive regulatory scheme and are not punitive in nature." *Gardner,* 841 F.2d at 1278. Plaintiffs have not proffered any fact that would distinguish the Philadelphia from Columbus schemes on this point.

Moreover, plaintiffs energetically argue that on its face the Ordinance is unambiguously criminal in nature. In support of this position, they point out that the penalties the Traffic Code set forth, before the Ordinance's amendments, are identical to those established by the new 12-2809, "Civil Penalties and Costs". Plaintiffs note that the only difference is that "the penalties are increased in most cases by 33%" (Plaintiffs' Brief In Opposition to Defendants' Motion for Summary Judgment at p. 18). Plaintiffs fail to recognize one other crucial distinction between the present Traffic Code's penalties and those of its predecessor. Before the City Council's 1989 amendments, the Traffic Code held out the possibility of imprisonment for violators (*see* 12-912, *amended by* 12-912 (1989)). In its present incarnation, the City Council has eliminated the threat of jail *(see* §12-912).

On its face, there is not sufficient evidence of the criminal nature of the Ordinance to override City Council's unambiguous designation of the Ordinance as one imposing civil penalties. Accordingly, we conclude that plaintiffs have not offered the "clearest proof" that the fines in question are so punitive in purpose or effect as to negate the express intention of the City Council that all such fines be deemed civil penalties.

With this analysis as our backdrop, we turn to plaintiffs' claims that the Ordinance is a bill of attainder or an unconstitutional *ex post facto* law. Both of these challenges to the Ordinance fail based on our finding that the new law's penalties are civil in nature.

A bill of attainder is "a legislative Act which inflicts punishment on named individuals or members of an easily ascertainable group without a judicial trial." *United States v. O'Brien,* 391 U.S. 367, 383 n. 30, 88 S. Ct. 1673, 1682 n. 30

(1968). "The proscription against bills of attainder reaches only statutes that inflict punishment on the specified individual or group." *Selective Serv. Sys. v. Minnesota Pub. Interest Research Group* 468 U.S. 841, 851, 104 S. Ct. 3348, 3354 (1984). In analyzing challenged legislation, the Supreme Court has applied a "functional test of the existence of punishment, analyzing whether the law under challenge, viewed in terms of the type and severity of burdens imposed, reasonably can be said to further nonpunitive legislative purposes." *Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425, 475-76, 97 S. Ct. 2777, 2806-07 (1977) (citing *Mendoza-Martinez*, 372 U.S. at 16869).

In *Gardner, supra*, the Sixth Circuit also concluded that for an act to be a bill of attainder it must inflict punishment, and that the Columbus ordinance did not do so. 841 F.2d at 1278. We are persuaded by the Sixth Circuit's reasoning, and therefore hold that because the penalties at issue are not punitive the Ordinance cannot be a bill of attainder.

Plaintiffs' contention that the Ordinance is an unconstitutional *ex post facto* law also fails under similar scrutiny. It is well-established that the *ex post facto* prohibition only applies to punitive legislation. Id. at 1280, (citing *Galvan v. Press*, 347 U.S. 522, 531 n. 4, 74 S. Ct. 737, 743 n. 4 (1954)). "The *ex post facto* prohibition forbids the Congress and the States to enact any law 'which imposes a punishment for an act which was not punishable at the time it was committed; or imposes additional punishment to that then prescribed.' " *Weaver v. Graham*, 450 U.S. 24, 28, 101 S. Ct. 960, 964 (1981) (quoting *Cummings v. Missouri*, 4 Wall. 277, 325-26 (1867)) (footnote omitted). In *Weaver*, the Supreme Court also noted, "no *ex post facto* violation occurs if the change effected is merely procedural, and does 'not increase the punishment nor change the ingredients of the offense or the

ultimate facts necessary to establish guilt.' " *Id.* at 29 n. 12 (quoting *Hopt v. Utah,* 110 U.S. 574, 590, 4 S. Ct. 202, 210 (1884)).

In the light of the Sixth Circuit's persuasive analysis in *Gardner,* we find that the *ex post facto* prohibition does not apply to the new Philadelphia regime because the penalties the Ordinance imposes are regulatory and not punitive in nature.

B. *Procedural Due Process*

For the plaintiffs' due process claim to reach constitutional dimensions and be cognizable under 1983, they must prove that (1) the defendant acted under color of state law; (2) plaintiffs were deprived of constitutionally-protected property because of the defendant's actions; (3) the deprivation occurred without due process of law; and (4) plaintiffs suffered injury as a result of the deprivation without due process. *Sample v. Diecks,* 885 F.2d 1099, 1113 (3d Cir. 1989); *see also Parratt v. Taylor,* 451 U.S. 527, 536-37, 101 S. Ct. 1908 (1981). Since the City understandably does not dispute that it acted under color of state law, we will only address the second and third elements of this test.

1. *Deprivation of a Property Right*

The second inquiry under the three-prong test requires us to consider whether the City's demand for money is a deprivation of a protected property interest within the meaning of the Fourteenth Amendment. We find it is. Citing *Monell v. Dept. of Social Serv. of City of New York,* 436 U.S. 658, 98 S. Ct. 2018 (1978), the City argues, "to establish a claim for violation of the Plaintiffs' due process rights, a municipal *policy of deliberate indifference* must be established" (Defendants' Memorandum of Law in Support of Motion for Summary Judgment at p. 32) (emphasis in original).

Appendix C

Since plaintiffs have not argued that City Council passed the Ordinance with deliberate indifference to their constitutional rights, the City concludes that plaintiffs' due process challenge must necessarily fail.[9]

The City fails to recognize an important distinction. To violate due process, it need not specifically intend to violate a person's constitutional right; rather, it must deliberately — and not accidentally — do an act that violates a person's constitutional right. Whether particular City Council members passed the Ordinance with actual consciousness that it violated due process is irrelevant. In *Daniels v. Williams,* 474 U.S. 327, 106 S. Ct. 662 (1986), the Supreme Court discussed its holding in *Wolff v. McDonnell,* 418 U.S. 539, 94 S. Ct. 2963 (1974) (depriving an inmate of good time credit without the necessary procedural protections violated the due process clause), which is instructive on this point. The Court stated, "We think the relevant action of the prison officials in that situation is their deliberate decision to deprive the inmate of good-time credit, not their hypothetically negligent failure to accord him the procedural protections of the

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9. We are perplexed by the City's reliance on *Monell* since the City's reading of it is irreconcilable with the following language of that opinion:

> Local governing bodies, therefore, can be sued directly under § 1983 for monetary, declaratory, or injunctive relief where, as here, the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers. *Monell,* 436 U.S. at 690 (footnote omitted).

We do not understand how *Monell* can be read as extending an invitation to federal courts to plumb the minds of state legislative actors.

Due Process Clause." *Daniels*, 474 U.S. at 333-34. Similarly, in the case at bar, the pertinent governmental action is the deliberate decision to pass the Ordinance and collect fines, not, as the City suggests, the hypothesized negligent failure to provide procedural due process.

In *Daniels*, the Supreme Court considered what constitutes a "deprivation" for purposes of a due process claim. The Court held that "the Due Process Clause is simply not implicated by a *negligent* act of an official causing unintended loss of or injury to life, liberty, or property." *Id.* at 328 (emphasis in original). The Court went on, however, to make clear that "*deliberate* decisions of government officials' to deprive a person of life, liberty, or property." *id.* at 331 (emphasis in original), *are* subject to due process constraints.

The case here unquestionably involves an established governmental procedure, something that is an intentional, affirmative act. The City deliberately demanded monies from parking violators or entered judgment against them. The property right involved is the right to keep money unless the government takes it through actions that comport with due process. If the state does not have a legitimate claim to a person's money and, nevertheless, under color of state law demands or receives payment, its conduct amounts to a constitutional deprivation.[10]

2. *What Process is Due?*

As courts have frequently emphasized, due process is a

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10. Though Mr. O'Neill never paid his fine, by virtue of the City's deliberate actions a judgment exists against him for money, a surely constitutionally-cognizable event. *D.H. Overmyer Co., Inc., of Ohio v. Frick Co.*, 405 U.S. 174, 185-187, 92 S. Ct. 775, 782-783 (1972); *see also Girard Trust Bank v. Martin*, 557 F.2d 386, 389 (3d Cir.), *cert. denied* 434 U.S. 985, 98 S. Ct. 612 (1977).

flexible concept and its protections vary according to the demands of a particular set of circumstances. *See Morrissey v. Brewer,* 408 U.S. 471, 481, 92 S. Ct. 2593, 2600 (1972). A minimal part of due process is adequate notice. "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306, 314, 70 S. Ct. 652, 657 (1950). Pertinent to the present controversy, "[a] decision made 'with blinders on', based on misinformation or a lack of information, cannot be binding as a matter of fundamental fairness and due process." *Covington v. Dept. of Health & Human Serv.,* 750 F.2d 937, 943 (D.C. Cir. 1984).

Plaintiffs do not contest the validity of the Ordinance as it applies to people who received parking tickets after June 1, 1989, the effective date of the Ordinance. Rather, they raise several due process challenges to the Ordinance as the Director of Finance applied it to O'Neill and Goodman, parking violators who received tickets before June 1, 1989.

Plaintiffs contend that the "Violation Warning Notice" (Exhibit 4) the BAA sent to both of them in November of 1989 is insufficient to meet the requirements of due process.[11] Specifically, plaintiffs argue that the notice did not inform them that the BAA would consider failure to make an election between it and the Traffic Court as an automatic consent to the BAA's jurisdiction. Thus, they argue that any action or inaction based upon such an

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11. Plaintiffs raise several due process challenges to the City's actions. Because we find the "Violation Warning Notice" violates due process, it is unnecessary for us to consider these other challenges.

imperfect notice could not constitute a knowing, intelligent, and voluntary waiver of their due process rights.

The City counters that it did not, through its notices, involuntarily deprive Goodman and O'Neill of any right they may have had to appear before the Traffic Court on their pre-June 1, 1989 tickets. The City justifies the sufficiency of the "Violation Warning Notice" and the "Order of Default" only by noting that the plaintiffs chose to appear at the BAA and that the notices "adequately apprised the plaintiff [*sic*] of their [*sic*] rights; and did not imply that a judgment had *already* been entered against them" (Response of City Defendants to Plaintiffs' Motion for Summary Judgment p. 6) (emphasis in original).

We must begin with careful scrutiny of the "Violation Warning Notice" itself. The operative portion of the notice reads in its entirety:

> You have ignored numerous notices previously mailed to you regarding the unpaid and uncontested parking violations listed below. We will continue to pursue this matter until these violations are contested or paid in full.
>
> In accordance with Chapter 12-2800 of the Philadelphia Traffic Code, for tickets previously filed with the Traffic Court, you may elect to request a hearing before the Philadelphia Traffic Court, as a Criminal matter, or before the Director of Finance's Bureau of Administrative Adjudication as a civil matter. To request a hearing before the Bureau of Administrative Adjudication, write

> to the P.V.B., P.O. Box 13850, Phila., PA, 19101. Hearings before the Traffic Court should be requested at 800 N. Broad Street, Phila, PA 19130. Be sure to include your name/ address, tickets [*sic*] number(s), and license plate number.
>
> Give this matter your prompt attention to avoid further legal action, including the chance that further violations could lead to BOOTING or TOWING of your vehicle.[12]

The City contends that this disclosure satisfies due process, and that any appearance before the BAA after its receipt constituted irrevocable consent to all aspects of the new regime.

To effect a waiver of a constitutional right, it is well-settled that the waiver must be voluntary, knowing, and intelligent. *Faretta v. California,* 422 U.S. 806, 835, 95 S. Ct. 2525, 2541 (1975); *Johnson v. Zerbst,* 304 U.S. 458, 468-69, 58 S. Ct. 1019, 1025 (1938). Moreover, as the Supreme Court stated in words that are now part of our basic constitutional vocabulary, "waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege," *Johnson,* 304 U.S. at 464. The Supreme Court has instructed courts to " 'indulge every reasonable presumption against waiver' of fundamental constitutional rights and . . . '[not to] presume acquiescence in the loss' " of such rights. *Id.* (quoting *Aetna Ins. Co. v. Kennedy,* 301 U.S. 389, 393, 57 S. Ct. 809, 811 (1931)); *Glasser v. United States,* 315 U.S. 60, 70-71, 62 S. Ct. 457, 465 (1942). While the Supreme Court has never defined

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12. It is unnecessary to our analysis to consider the language of the Order of Default because it does not relate to the election referred to in the Violation Warning Notice.

precisely what constitutes a voluntary, knowing, intelligent waiver, the Court has stated that whether a person has waived a constitutional right "depends in each case 'upon the particular facts and circumstances surrounding that case, including the background, xperience and conduct"' of the waiving party. *Edwards v. Arizona,* 451 U.S. 477, 482, 101 S. Ct. 1880, 1883 (quoting *Johnson,* 304 U.S. at 464) (criminal context).

We do not quarrel with the City's power to require pre-June 1, 1989, parking violators to make an election between the Traffic Court and the BAA. Nor do we believe that due process required the City to make an exhaustive disclosure of all the rights affected by such an election. Due process in such a context does not demand the breadth of disclosure required for a new public issue of securities. At a minimum, however, due process does require that the City inform notice recipients of the consequences of inaction. Nowhere does the notice inform its recipient that not making the election would automatically place the individual forever in the BAA's jurisdiction, and yet that is precisely what happened to Goodman and O'Neill.

Neither made the election, but unbeknownst to each the BAA took their silence to be irrevocable consent to its jurisdiction. In Goodman's case, he requested a BAA hearing for a ticket issued in February 1991. To his dismay he discovered that the BAA would also include tickets issued before June 1, 1989 in the proceeding because he never responded to the "Violation Warning Notice." In O'Neill's case, he requested a hearing before the Traffic Court in April of 1991, but that court informed him that it no longer heard parking violation cases. O'Neill's only option was to appear before the BAA, a fate that he had unwittingly consented to when he did not respond to the "Violation Warning Notice." Thus, it cannot be said that either plaintiff made a voluntary, knowing and intelligent

waiver of his right to a hearing before the Traffic Court under the old regime.

Relying on *Parratt, supra,* 451 U.S. at 527, the City contends that even if the "Violation Warning Notice" violated due process, it provided sufficient postdeprivation remedies to Goodman and O'Neill to meet the requirements of due process. The only postdeprivation remedy the City points to is the right Goodman and O'Neill had to appeal the decision of the BAA's Hearing Examiner to the Parking Appeals Panel, and then, if desired, to the Court of Common Pleas (*see* Defendant's Memorandum of Law in Support of Motion for Summary Judgment at p. 13).[13] We are not persuaded that these remedies cure the material omission in the notice.

This putative postdeprivation remedy does not speak to the inadequacies of the "Violation Warning Notice" that we have identified. It does not redress the City's failure to inform Goodman

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13. There is one other procedure the BAA employs that, although the City did not cite it as such, could be argued to be a postdeprivation remedy. When a person appears before a BAA Hearing Examiner, he or she can request that a particular ticket not be made a part of the proceeding. When this occurs, it is entered into the computer data base as a "Disposition 41", meaning it is "not in the case" (Exhibit B, Dominic Ceremeli Deposition at pp. 105-06). Whether the City had yet invented a code-41 disposition at the time of Goodman and O'Neill's hearings is a point of contention between the parties. Its existence, however, is inconsequential as a cure for the deficiency in the "Violation Warning Notice" that we have discussed above. Even assuming Goodman and O'Neill could have requested a code-41, at the time of both of their hearings the Traffic Court no longer adjudicated parking violation cases. Therefore, requesting that the Hearing Examiner keep their pre-June 1, 1989 tickets out of the BAA proceeding would not have permitted Goodman and O'Neill to avail themselves of their right to a Traffic Court hearing, a right they lost without any notice whatever. Moreover, a code-41 would do nothing to cure the unconsented-to loss of a two-year limitations period and imposition of no limitations period.

and O'Neill that their silence regarding whether they wanted to proceed in the BAA or the Traffic Court would be construed as irrevocable consent to the BAA's open-ended jurisdiction. The right Goodman and O'Neill had to appeal the Hearing Examiner's decision does not restore the rights they had, and unwittingly forfeited, to appear before the Traffic Court and benefit from the existence of a limitations period.

C. *Relief*

Because we find that a procedural due process violation has occurred, we must fashion a remedy. In this regard, we will take a page from the Seventh Circuit which has instructed that when a court finds a due process violation it "should fashion a remedy that is consistent with the principle that due process is a flexible concept whose procedural protections depend on the peculiar circumstances of each case." *Perry v. F.B.I.*, 759 F.2d 1271, 1281 (7th Cir. 1985) (citing *Morrissey, supra*, 408 U.S. at 481), rev'd on reh'g en banc on other grounds, 781 F.2d 1294 (7th Cir. 1986).

In this case Goodman and O'Neill were unconstitutionally deprived of their right to appear before the Traffic Court rather than the BAA on tickets issued before June 1, 1989. The question now becomes, what harm resulted from this deprivation? Throughout their memoranda plaintiffs seem to suggest that the BAA proceeding denied Goodman and O'Neill of three rights that they would have had in Traffic Court: (1) the requirement that a disposition could only be made in Traffic Court if the defendant appeared in person; (2) guilt was required to be proved beyond a reasonable doubt rather than by a preponderance of the evidence in a BAA proceeding; and (3) the availability of a statute of limitations defense for all tickets more than two years old at the time of the Traffic Court proceeding.

We are not impressed by the first two harms that plaintiffs articulate. While it is true that the Traffic Court rules required a personal appearance and proof of guilt beyond a reasonable doubt before the Traffic Court could impose liability, it is also true that the Traffic Court had criminal sanctions at its disposal. For example, the personal appearance requirement was logical given that the Traffic Court had the power to issue bench warrants for the arrest of parking violators who failed to appear at their scheduled hearings. Moreover, the Traffic Court rules required proof of guilt beyond a reasonable doubt because the Traffic Court could impose imprisonment as punishment for a parking violator it found guilty. The BAA possesses no such powers over a violator's liberty. Goodman and O'Neill may have lost these protections, but they also did not face the sanctions a Traffic Court proceeding could have imposed on them. For these reasons, as for the first two injuries that plaintiffs identify, we find the harm of no moment and therefore not deserving of relief.

The lost statute of limitations defense presents a more vexing problem for the City. When the City issued the "Violation Warning Notice" in November of 1989, it contends that "not one of the tickets which are the subject matter of this lawsuit met the Statute of Limitation defense" (Response of City Defendants to Plaintiffs' Motion for Summary Judgment at p. 8). This statement, aside from being untrue,[14] is also irrelevant. To rehearse once again, the "Violation Warning Notice" did not inform plaintiffs that their failure to elect between the two forums would automatically and irrevocably place them in the BAA's jurisdiction. The City's defective notice deprived the plaintiffs, without their consent or

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14. Clearly Goodman's February 26, 1987 ticket met the statute of limitations defense and, perhaps, O'Neill's November 28, 1987 ticket did as well, depending on the exact date the City sent the "Violation Warning Notice".

knowledge, of the possibility of a Traffic Court proceeding with its attendant opportunity to avoid prosecution after two years. Thus, to the extent plaintiffs could have asserted the statute of limitations defense in a Traffic Court proceeding, the City has harmed them.[15]

The BAA assessed fines against Goodman totalling $247.00. Of that amount, $173.00 was for tickets issued before June 1, 1989, and that is the amount that the City should refund to Goodman because it was imposed by a tribunal which had not properly asserted jurisdiction over him and the former statute of limitations had expired as to all tickets by May 16, 1991. As for O'Neill, although he has not paid his fines, he does have a judgment against him for tickets issued before June 1, 1989, in the amount of $45.00. The City should vacate this liability.

Recalling that this action is also a test case to resolve the legal questions affecting as many as 2.7 million license holders who had unpaid tickets outstanding as of June 1, 1989, we must also fashion commensurate relief for people similarly situated to Messrs.

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15. The City cites *Commonwealth v. Quinn*, 405 Pa. Super. 487, 592 A.2d 1316 (1991), *appeal denied* 529 Pa. 619, 600 A.2d 535 (1991) for the proposition that a period of delay attributable to the accused tolls the statute of limitations. *Quinn* is distinguishable for at least two reasons. First, until the Superior Court decided it on June 17, 1991, the rule in Pennsylvania was that failure to complete proceedings under 42 Pa. Con. Stat. Ann. §5553(e) absolutely required discharge of the accused. *Commonwealth v. Jannenga*, 335 Pa. Super. 77, 81, 483 A.2d 963, 965 (1984). Second, in *Quinn* there was an adjudication of guilt within twenty-four days of the violation, but sentencing was delayed beyond two years because the defendant ultimately succeeded in perfecting an appeal *de novo nunc pro tunc* notwithstanding his failure to appeal within thirty days of the initial finding of guilt. Here, no one seriously suggests that *Quinn* would be applied retroactively to violations as far back as 1987, and by the date *Quinn* became final all of the subject tickets here had become unenforceable under the old regime. It is also undisputed that no tribunal at any level found either Goodman or O'Neill guilty before June 1, 1989.

Goodman and O'Neill. Although we will order the City and plaintiffs to submit their views on class-wide remedies, we recognize the potentially heavy financial burden such relief may add to a City whose resources are, to risk understatement, limited at this time. We will therefore stay this aspect of our Order for the later of thirty-one days or the date of final appellate review of our decision.

IV. *Conclusion*

We have reluctantly reached the result we have explained in this memorandum. There is no small element of *chutzpah* on the part of both plaintiffs that is, in effect, rewarded by this outcome - they admit, after all, to having repeatedly ignored notices issued during the old regime. It is well to recall, however, that many constitutional victories have been won by parties considerably more odious than parking ticket scofflaws.

To the extent of the foregoing analysis, we shall grant plaintiffs' motion for summary judgment and deny defendant's. An appropriate Order follows.

Appendix C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION
NO. 91-6759

JOHN O'NEILL and SAMUEL GOODMAN

v.

CITY OF PHILADELPHIA, et al.

ORDER

AND NOW, this 29th day of March, 1993, upon consideration of plaintiffs' motion for summary judgment and defendant's response, and defendant's motion for summary judgment and plaintiffs' response, and for the reasons stated in the foregoing Memorandum, it is hereby ORDERED that the motions are GRANTED IN PART and DENIED IN PART in that:

1. With respect to Count I of plaintiffs' second amended complaint, defendant's motion is GRANTED and plaintiffs' motion is DENIED;

2. With respect to Count II of plaintiffs' second amended complaint, plaintiffs' motion is GRANTED to the extent of plaintiffs' due process claim and in all other respects defendant's motion is GRANTED and plaintiffs' motion is DENIED;

3. With respect to Count III and to the extent Count IV alleges defendants violated state law, plaintiffs' claims therein are deemed WITHDRAWN without prejudice;

4. With respect to the remaining aspects of Count IV, defendant's motion is GRANTED and plaintiffs' motion is DENIED;

5. With respect to Count V, defendant's motion is GRANTED and plaintiffs' motion is DENIED;

By reason of the foregoing, and as explained in the foregoing Memorandum, it is FURTHER ORDERED that:

6. JUDGMENT IS ENTERED in favor of plaintiff Samuel Goodman and against defendant City of Philadelphia in the amount of $173.00;

7. JUDGMENT IS ENTERED in favor of plaintiff John O'Neill and against defendant City of Philadelphia, and the City is directed to vacate its judgment against O'Neill of $45.00;

8. As for relief to people similarly situated to plaintiffs, the City and plaintiffs shall within thirty days submit memoranda regarding their views as to the appropriate form(s) of relief and the procedure to be adopted by the Bureau of Administrative Adjudication to enable such persons to avail themselves of the benefits conferred by reason of the foregoing Memorandum;

9. Plaintiffs are prevailing parties within the meaning of 42 U.S.C. §1988 and *Farrar v. Hobby,* 1992 U.S. LEXIS 7846, 113 S. Ct. 566 (1992);

10. Paragraph 8 hereof is STAYED until the later of thirty-one days from the date of entry of this Order or final appellate review of this Order; and

Appendix C

11. With respect to paragraph 9 hereof, plaintiffs' counsel shall submit their application for an allowance of interim fees and expenses thirty days after the expiration of the stay referred to in the preceding paragraph unless this Order shall become ineffective by virtue of appellate action.

BY THE COURT:

s/ Stewart Dalzell
Stewart Dalzell, J.

3-29-93
Copies to:
V. Ziccardi
A. Mimnaugh
R. Freeeman
D. Russo
Opinion

Supreme Court, U.S.
FILED
FEB 17 1995
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(2)

NO. 94-982

In The

Supreme Court of The United States

October Term 1994

JOHN O'NEILL and SAMUEL R. GOODMAN, on behalf of themselves and all others similarly situated,

Petitioners,

vs.

CITY OF PHILADELPHIA, PHILADELPHIA PARKING AUTHORITY, OFFICE OF DIRECTOR OF FINANCE, BUREAU OF ADMINISTRATIVE ADJUDICATION,

Respondents.

BRIEF OF RESPONDENT CITY OF PHILADELPHIA, OFFICE OF DIRECTOR OF FINANCE, BUREAU OF ADMINISTRATIVE ADJUDICATION IN OPPOSITION TO A PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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22pp

COUNTERSTATEMENT OF THE QUESTIONS PRESENTED FOR REVIEW

1. Did the Court of Appeals for the Third Circuit err in reviewing the District Court's decision refusing to abstain under *Younger v. Harris,* 401 U.S. 37 (1971) for abuse of discretion, rather than *de novo?*

2. Did the District Court err in refusing to abstain under *Younger v. Harris,* 401 U.S. 37 (1971), where state administrative proceedings, implicating an important state interest, had been discontinued without state judicial or administrative review, and where Petitioners' federal claims could have been raised in the course of such review?

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NO. 94-982

In The

Supreme Court of The United States

October Term 1994

JOHN O'NEILL and SAMUEL R. GOODMAN, on behalf of themselves and all others similarly situated,

Petitioners,

vs.

CITY OF PHILADELPHIA, PHILADELPHIA PARKING AUTHORITY, OFFICE OF DIRECTOR OF FINANCE, BUREAU OF ADMINISTRATIVE ADJUDICATION,

Respondents.

BRIEF OF RESPONDENT CITY OF PHILADELPHIA, OFFICE OF DIRECTOR OF FINANCE, BUREAU OF ADMINISTRATIVE ADJUDICATION IN OPPOSITION TO A PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

COUNTERSTATEMENT OF THE CASE

Respondent[1] adopts as its Counterstatement of Facts the summary of events and overview of relevant administrative procedures of the Bureau of Administrative Adjudication ("BAA") set forth in the majority opinion of the

1 The Office of the Director of Finance and the Bureau of Administrative Adjudication are not separate legal entities, but simply agencies of the City of Philadelphia, which the District Court found was the only proper defendant. (*See* Opinion of District Court, A. 51a, n.1)

Court of Appeals. (A. 6a -12a) We wish to clarify certain points directly relevant to the issue presented in the present Petition for Certiorari.

A.

Within the BAA adjudicatory scheme, an initial decision of a hearing examiner may be appealed to the Parking Appeals Panel. (A. 7a) The Parking Appeals Panel has the power to affirm, reverse or modify any determination appealed from, and may also hear the case *de novo.* Phila. Code §12-2808(2). By the terms of the ordinance, the Appeals Panel "shall have the power to review the facts and the law, and shall have power to affirm the determination or to reverse or modify any determination appealed from for error of fact or law. . ." Phila. Code §12-2808(2)(emphasis added). Thus, under this section, constitutional challenges to BAA proceedings can be raised in the context of an administrative appeal. No Pennsylvania cases exist which prohibit an administrative agency from considering such questions.

The order of the Parking Appeals Panel constitutes the final order of the Director of Finance; if no appeal is taken, the order of the hearing examiner is the final order.[2]

Judicial review of the BAA's final order is available by way of an appeal to the Court of Common Pleas of Philadelphia County pursuant to Pennsylvania's Local Agency

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2 Phila. Code § 12-2808(5) states:

"The order of a Parking Appeals Panel shall be the final order of the Finance Director's Office. However, in the event that no appeal is taken, the order of the Parking Hearing Examiner shall be the final order. If payment is not made within thirty (30) days after entry of a final order determining liability for a parking violation and fixing fines, costs and additional fees for such violation, such fines, costs and additional fees shall be considered a debt due and owing the City."

Law, 2 PA.C.S.A. §§ 751-754, and the Judicial Code, 42 PA.C.S.A. § 933(a)(2).[3] On appeal to the Court of Common Pleas, a defendant clearly has the opportunity to raise the constitutionality of the proceedings before the BAA.[4]

Pursuant to the terms of BAA ordinance, any appeal to the Parking Appeals Panel from a hearing examiner's determination must be taken within 30 days of entry of such final determination. Phila. Code §12-2808(3). By local court rule, a party appealing to the Court of Common Pleas has 30 days from the date of the adjudication by the

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[3] Specifically, 2 PA.C.S.A. § 752 states:

"Any person aggrieved by an adjudication of a local agency who has a direct interest in such adjudication shall have the right to appeal therefrom to the court vested with jurisdiction of such appeals by or pursuant to Title 42 (relating to judiciary and judicial procedure)."

[4] 2 PA.C.S.A. § 754 provides, in relevant part:

(a) In the event a full and complete record of the proceedings before the local agency was not made, the court may hear the appeal de novo, or may remand . . . for the purpose of making a full and complete record. . .

(b) In the event a full and complete record of the proceedings before the local agency was made, the court shall hear the appeal without a jury on the record certified by the agency. After hearing the court shall affirm the adjudication unless it shall find that the adjudication is in violation of the constitutional rights of the appellant, or is not in accordance with law . . .

agency within which to file an appeal.[5]

A final BAA order assessing fines is not a judgment against the violator, but merely a debt owed to the City. Phila. Code §12-2808(5). (A. 7a) This is true regardless of whether the final order results from a default because of failure to request a hearing, or from a determination of liability after a hearing or after an administrative appeal. In order to collect the debt, the City must proceed to a court of appropriate jurisdiction to obtain an enforceable judgment.

Enactment of the Ordinance created a period of dual jurisdiction. Phila. Code § 12-2807(8). (A. 8a) A person who had received a parking ticket, citation or summons from the Traffic Court between October 2, 1987 and June 1, 1989, could choose to proceed either in Traffic Court or the BAA.[6]

In Traffic Court, a defendant was entitled to three rights not provided in a BAA hearing: a disposition could not be made without the personal appearance of the defendant; the defendant's guilt had to proved beyond a reasonable doubt; and, because parking violations are summary offenses, they

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5 Phila. Civ. R. 320(D), states:

"(D) *Time for Appeal.* An appeal shall be filed not later than thirty days after the date of the adjudication by the agency unless otherwise provided by statute or ordinance. The date of the adjudication shall be the date of mailing of the notice of adjudication by the agency, which date shall be separately and clearly designated on such notice." [Footnote omitted]

6 June 1, 1989 is the effective date of the ordinance which established the BAA. The reason for the October 2, 1987 date is that individuals with tickets issued prior to that date were automatically eliminated from the computer system because they presumptively qualified for the two year statute of limitations defense applicable in Traffic Court. (A. 54a, n.2)

were subject to the two year statute of limitations contained in 42 Pa.C.S.A. § 5553(e).

B.

Petitioners Goodman and O'Neill each received parking tickets before the effective date of the Ordinance. (District Court's Opinion, A. 54a) Neither Petitioner paid the fines, and the Traffic Court lodged an information and issued a summons. (A. 55a) A summons was served on each, stating the fines and penalties for the offense, with a notice to appear in Traffic Court on a date certain. Neither Goodman nor O'Neill appeared for the scheduled hearing, and the Traffic Court periodically sent notices to them seeking payment. (A. 55a)

In November of 1989, Goodman and O'Neill each received a "Violation Warning Notice" from the Office of the Director of Finance. This notice informed them that they could elect to appear before the Traffic Court or proceed in the BAA, and informed them that the former proceeding would be treated as a criminal matter whereas the BAA proceeding would be a civil action. Goodman and O'Neill took no action in response to this notice.

On March 4, 1991, Goodman requested a hearing before the BAA to adjudicate a ticket he received on February 4, 1991. At the hearing, the BAA listed for disposition four additional tickets for violations that had occurred before June 1, 1989. Counsel for Goodman appeared at the hearing and objected to including these pre-June 1, 1989 tickets in the proceedings, on the basis that they were within the Traffic Court's exclusive jurisdiction and that Goodman had not consented to the BAA's jurisdiction. Moreover, Goodman's counsel raised the statute of limitations defense as to all tickets that were more than two years old.

On the date of Goodman's hearing (March 18, 1991), a "Code 41" disposition was available in BAA proceedings which, when requested, would have required the hearing

examiner to refrain from making any disposition of parking tickets which Goodman refused to submit to the Director of Finance's jurisdiction. The provision for a Code 41 disposition is consistent with § 12-2807(8) of the Ordinance, which states that a party may elect to have violations originally subject to Traffic Court jurisdiction heard by the BAA.

The hearing examiner overruled Goodman's objections, apparently holding that the BAA had jurisdiction regardless of consent, and that the statute of limitations only applied in Traffic Court where parking violations were treated as criminal offenses. The Hearing Examiner determined liability, and assessed a total fine of $247.00, which included $173.00 for tickets issued before June 1, 1989. Goodman has paid his fines.

When Petitioner O'Neill tried to have three pre-June 1, 1989 parking tickets listed for disposition in Traffic Court in April of 1991, the court informed him that it no longer heard parking violation cases. Subsequently, O'Neill requested a hearing, which the BAA scheduled for August 30, 1991. O'Neill attended the hearing with counsel, raised the same objections as Goodman, and experienced the same lack of success. The Hearing Examiner determined liability, and reduced the assessment of fines to $45.00. To date, O'Neill has not paid any of his fines. The same Code 41 disposition which was available in Goodman's case was also available to O'Neill.

Neither Goodman nor O'Neill ever appealed to the Parking Appeals Panel or to the Court of Common Pleas.

As noted above, a default or a finding of liability by a BAA hearing examiner or the Parking Appeals Panel does not result in a judgment against the offender, but is only considered a debt due the City. Phila. Code §12-2808(5). (A. 7a) It is undisputed that no judgments were ever entered against either Petitioner, and that their vehicles were never towed or immobilized as a result of any of the violations or proceedings at issue in this case.

Respondent disagrees with Petitioners' statement to the effect that the Director of Finance transferred all traffic tickets issued out of Traffic Court prior to June 1, 1989 into the jurisdiction of the BAA, and that such tickets were "transposed into a mature debt . . . to the City of Philadelphia." (Petition for Certiorari, p. 4). On the contrary, these Petitioners were afforded an opportunity for hearing on their pre-June 1, 1989 tickets before the BAA. At that hearing, they had the opportunity to raise the statute of limitations defense, as well as the opportunity to object to BAA jurisdiction by invoking the Code 41 procedure. In the event the BAA Hearing Examiner or Parking Appeals Panel rejected these defenses, Petitioners had full opportunity for judicial review. Finally, any further collection effort could not have proceeded on the basis of a final order of the BAA, but would have required a judgment against Petitioners from a state court.

C.

Petitioners commenced this action on October 30, 1991 in the United States District Court for the Eastern District of Pennsylvania under 42 USC § 1983, seeking declaratory and injunctive relief, and monetary damages, for alleged deprivation of their constitutional rights. On January 6, 1992, one of the defendants, the Philadelphia Parking Authority, was dismissed from the case with prejudice pursuant to a motion under Fed. R. Civ. P. 12(b)(6). Thereafter, Petitioners were granted leave to amend their Complaint. The case proceeded on the basis of their Second Amended Complaint.

In their prayer for relief before the District Court, Petitioners asked that the BAA ordinance be declared void to the extent that it conferred jurisdiction upon the BAA; that all BAA hearings on parking violations occurring prior to March 22, 1989 and all liability imposed thereon, be declared void; that defendants be enjoined from conducting hearings or collecting fines for parking violations which occurred prior to March 22, 1989; and that the City be ordered to refund all fines, costs and fees collected as a result of the allegedly void

proceedings. Thus the relief sought by Goodman and O'Neill in federal court constituted a direct attack on the results of the BAA's adjudications against these Petitioners.

On the date the federal suit was commenced, the time for Petitioner Goodman to file an appeal to the Parking Appeals Panel or the Court of Common Pleas had expired. Goodman, of course, had chosen to pay the amount assessed against him. O'Neill, on the other hand, may have been within the time for appealing to state court on the date the federal action was commenced.[7] In any event, no such appeal was ever filed.

Abstention was properly raised in the City's Answer to Plaintiffs' Second Amended Complaint and in the City's Motion for Summary Judgment. The subsequent proceedings in the District Court and the Court of Appeals are clear from the Opinions of those courts.

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[7] A defendant has thirty days from entry of a hearing examiner's determination to appeal to the Parking Appeals Panel. Phila. Code §12-2808(3). Failure to appeal renders the order final. Thereafter, the defendant has thirty days from the date of mailing of a notice of adjudication to appeal to the Court of Common Pleas. *Supra,* at n. 5.

It is unclear from the record when the hearing examiner's determination was entered in O'Neill's case, and it may have been after the August 30, 1991 hearing. It is also possible that the mailing date of the notice of adjudication may have extended the period for appealing to state court for a few days. Both of these factors may have combined to extend the date for filing a state court appeal until shortly after the date the federal suit was filed (October 30, 1991).

SUMMARY OF ARGUMENT

In reaching its decsion that the District Court should have abstained under *Younger v. Harris,* the U.S. Court of Appeals for the Third Circuit utilized an abuse of discretion standard of review. This standard conflicts with the *de novo* standard of review for *Younger* abstention used by the Sixth, Seventh and Ninth Circuits.

Nevertheless, the Court of Appeals' reversal of the District Court pursuant to *Younger* was correct under the applicable decisions of this Court, particularly under *Ohio Civil Rights Commission v. Dayton Christian Schools, Inc.*, 477 U.S. 619 (1986).

However, the precise question of whether a state proceeding is pending for *Younger* purposes where state administrative proceedings had taken place, but were discontinued without state administrative or judicial review which would have afforded plaintiffs the chance to raise their constitutional claims, has not been decided by this Court, and has produced conflicting answers among the circuits.

ARGUMENT

I. THE STANDARD BY WHICH THE COURT OF APPEALS REVIEWED THE DISTRICT COURT'S REFUSAL TO ABSTAIN WAS INCORRECT, AND IN CONFLICT WITH THE STANDARD OF REVIEW APPLIED IN OTHER CIRCUITS.

Respondent believes that it is appropriate to call attention to an issue which is fairly encompassed within the Petitioners' Question Presented for Review, but which was not expressly stated by Petitioners. This question is whether a district court's decision to abstain under *Younger* should be reviewed by a court of appeals under a *de novo* standard of review, or for abuse of discretion. This question is closely connected with the question presented by Petitioners. Furthermore, it is a question that it has not previously been decided by this Court, and which has generated conflicting answers by different courts of appeals.

In reviewing the District Court's judgment, the Court of Appeals for the Third Circuit applied a two-part standard of review:

> "We exercise plenary review over the legal determinations of whether the requirements for abstention have been met. [Citations omitted.] Once we determine that the requirements have been met, we review a district court's decision to abstain under *Younger* abstention principles for abuse of discretion." *Gwynedd Properties, Inc. v Lower Gwynedd Township,* 970 F.2d 1195, 1199 (3d Cir. 1992).

(A. 13a)

This standard of review is directly contrary to that used by the Ninth Circuit, which reviews a district court's refusal to abstain under a *de novo* standard. *Fresh International Corp. v. Agricultural Labor Relations Bd.,* 805 F.2d 1353, 1356 and n. 2 (9th Cir. 1986); *Polykoff v. Collins,* 816 F.2d 1326, 1332 (9th Cir. 1987); *Beltran v.*

State of California, 871 F.2d 777, 781 (9th Cir. 1988). The Third Circuit's standard of review is also at odds with the decisions of the Sixth and Seventh Circuits, which review a district court's decision to abstain *de novo. Traughber v. Beauchane,* 760 F.2d 673 (6th Cir. 1985); *Trust & Investment Advisers, Inc. v. Hogsett,* ___ F.3d ___, 1994 WL 706102 (7th Cir. December 19, 1994)(reviewing the cases and noting the conflict among the circuits).

We submit that the Ninth Circuit rule is correct. This Court has stated that where the prerequisites for abstention under *Younger* are satisfied, a district court is required to abstain absent evidence of bad faith, harassment, patent invalidity of a state statute or other extraordinary circumstances. *Colorado River Water Conservation Dist. v. United States,* 424 U.S. 800, 816 n. 22 (1976); *Middlesex County Ethics Committee v. Garden State Bar Assoc.,* 457 U.S. 423, 432 (1982). Accordingly, in *Fresh International Corp.,* the court held that while an abuse of discretion standard may be appropriate for other forms of abstention, it is not suitable for review of *Younger* claims because a district court has no discretion to issue an injunction in such cases. *Fresh International Corp.,* 805 F.2d at 1356 n. 2.

As noted in *Fresh International Corp.*, cases using the abuse of discretion standard generally involve abstention claims brought under a variety of different theories besides *Younger. Fresh International Corp.,* 805 F.2d at 1356 n. 2. Such cases seem to be the origin of the Third Circuit rule. *See Kentucky West Virginia Gas Co. v. Pennsylvania Public Utility Comm'n,* 791 F.2d 1111, 1115 (3d Cir. 1986)(reviewing claims of *Burford* and *Younger* abstention under an abuse of discretion standard of review); *United Services Automobile Ass'n v. Muir,* 792 F.2d 356 (3d Cir. 1986)(reviewing *Burford, Pullman* and *Younger* claims under a single abuse of discretion standard).

Arguably *Hawaii Housing Authority v. Midkiff,* 467 U.S. 229 (1984) supports an abuse of discretion standard of review. ("We begin with the question whether the District Court abused its discretion in not abstaining from the exercise

of its jurisdiction." *Id.* at 236) But *Midkiff* involved both *Younger* and *Pullman* abstention, and disposed of the *Younger* claim not under an abuse of discretion standard, but by deciding that an essential predicate for abstention, the pendency of state judicial proceedings, was not present. *Id.* at 237-38. This amounted to a determination that the lower court erred as a matter of law, not that it abused its discretion.

II. THE COURT OF APPEALS' DECISION THAT ABSTENTION WAS PROPER UNDER THE FACTS OF THIS CASE IS CONSISTENT WITH THE DECISIONS OF THIS COURT. HOWEVER, THERE EXISTS A CONFLICT AMONG THE CIRCUITS ON THIS ISSUE.

The precise question on which certiorari is sought is whether the District Court erred in refusing to abstain where state administrative proceedings, implicating an important state interest, were discontinued without state judicial or administrative review, and where Petitioners' constitutional claims could have been raised in the course of such administrative or judicial review. This question has been recognized, but not squarely addressed, by this Court. *New Orleans Public Service, Inc. v. Council of City of New Orleans,* 491 U.S. 350, 369 n. 4 (1989)

The Court of Appeals found while the BAA proceedings had terminated without the involvement of any state court, that fact did not reduce the state's interest in the proceedings to the extent that abstention under *Younger* was improper. Despite the forceful dissent of the Honorable Timothy K. Lewis, we submit that the decision of the Court of Appeals was consistent with the principles stated by this Court concerning federal abstention from interference with state proceedings.

Although *Younger* involved an injunction against a pending state criminal proceeding, it has been extended to federal actions seeking declaratory relief. *See Samuels v. Mackell*, 401 U.S. 66 (1971). Furthermore, *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975) has extended *Younger* to

require abstention where the state proceedings, although civil in nature, are closely akin to criminal proceedings. This has been held to include nuisance actions (*Huffman*), professional disciplinary actions (*Middlesex County Ethics Committee*, 457 U.S. 423 (1982)), and contempt proceedings (*Juidice v. Vail*, 430 U.S. 327 (1977)).

This Court has stated that *Younger* abstention is fully applicable even where state judicial proceedings have terminated prior to commencement of the federal action, if the federal plaintiff failed to exhaust available state court appellate remedies. *Huffman*, 420 U.S. 607-611 and n.22.

That the principles of *Younger* apply to state administrative proceedings was established in *Middlesex County Ethics Committee* and *Ohio Civil Rights Commission v. Dayton Christian Schools, Inc.*, 477 U.S. 619 (1986). Indeed, *Dayton* established that it is sufficient for abstention purposes that a plaintiff's constitutional claims can be raised in state judicial review of an administrative proceeding, even if they might not properly be raised in the administrative proceeding itself. *Dayton*, 477 U.S. at 629.

In essence, the only distinguishing feature of this case, and the central point argued in Judge Lewis' dissent, is that the state proceedings in this case were at an end. This is true, but it cannot be the basis for holding that *Younger* does not apply. The termination of state proceedings is the result of Petitioners' own failure to avail themselves of the opportunities for state administrative and judicial review. Such opportunities existed under the BAA ordinance (Phila. Code §12-2808(2)), and under 2 PA.C.S.A. §§ 751-754. It is clear that in light of Petitioners' own refusal to appeal, it must be presumed that the state appellate process afforded them full and fair opportunity to present their federal constitutional claims. *Pennzoil. Co. v. Texaco*, 481 U.S. 1, 15 (1987).

The Court of Appeals clearly believed that the state's interest in regulation of on-street parking and the adjudication of violations was important. (A. 19a) Indeed, the Court noted that violations were previously treated as criminal offenses.

(A. 19a, n.15) If the state's interest in the subject matter of the BAA proceedings is important enough to warrant abstention while those proceedings are actually pending, which would be the result under *Dayton,* that result should not change because the proceedings are terminated, especially when they were ended by the voluntary choice of the Petitioners to commence action in federal court.

We believe that the Court of Appeals decision is correct and follows directly from this Court's decisions, but it is impossible to deny that there is a serious conflict among the circuits on the question presented for review. *Compare Allegheny Corp. v. Pomeroy,* 898 F.2d 1314 (8th Cir. 1990), *Allegheny Corp. v. McCartney,* 896 F.2d 1138 (8th Cir. 1990), and *Nevada Entertainment Industries v. City of Henderson,* 8 F.3d 1348 (9th Cir. 1993)(per curiam), all of which are consistent with the Third Circuit's decision in this case, *with Thomas v. Texas State Board of Medical Examiners,* 807 F.2d 453 (5th Cir. 1987) and *Norfolk & Western Railway Co. v. Public Utilities Comm'n of Ohio,* 926 F.2d 567 (6th Cir. 1991), holding that abstention was improper once state administrative proceedings were at an end. We therefore concede that this case appears to satisfy one of the considerations which are relevant to the exercise of the Court's discretion to grant certiorari. Supreme Court Rule 10.1(a).

CONCLUSION

Respondent believes that the Court of Appeals for the Third Circuit has decided the abstention question correctly under the applicable decisions of this Court. *See* Supreme Court Rule 10.1(c). Respondent concedes that the Court of Appeals' decision is in conflict with the decisions of other circuits on the same question, and that this question has not been directly determined by this Court. *See* Supreme Court Rule 10.1(a) & (c). Finally, Respondent takes no position on whether the Court of Appeals "has decided an important question of federal law which . . . should be decided by this Court." *See* Supreme Court Rule 10.1(c).

Respectfully submitted,

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No. 94-982 (3)

FILED
DEC 7 1995

In The

Supreme Court of the United States

October Term, 1994

JOHN O'NEILL and SAMUEL R. GOODMAN, on behalf of themselves and all others similarly situated,

Petitioners,

vs.

CITY OF PHILADELPHIA, PHILADELPHIA PARKING AUTHORITY, OFFICE OF DIRECTOR OF FINANCE, BUREAU OF ADMINISTRATIVE ADJUDICATION,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

AMICUS CURIAE BRIEF OF THE CITY OF HENDERSON, NEVADA, IN SUPPORT OF RESPONDENTS

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994
NO. 94-982

JOHN O'NEILL AND SAMUEL R. GOODMAN, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,

PETITIONERS,

v.

CITY OF PHILADELPHIA, PHILADELPHIA PARKING AUTHORITY, OFFICE OF DIRECTOR OF FINANCE, BUREAU OF ADMINISTRATIVE ADJUDICATION,

RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

AMICUS CURIAE BRIEF OF THE CITY OF HENDERSON, NEVADA, IN SUPPORT OF RESPONDENTS

Pursuant to United States Supreme Court Rules 37.2 and 37.5, the City Attorney of Henderson, Nevada files this amicus curiae brief on behalf of the City of Henderson, State of Nevada in support of Respondents City

of Philadelphia, Philadelphia Parking Authority, Office of the Director of Finances, and Bureau of Administrative Adjudication in O'Neill and Goodman et al., Petitioners vs. City of Philadelphia et al., Respondents. Case No. 94-982 (hereinafter referred to as O'Neill/Goodman Petition in 94-982).

INTEREST OF AMICUS CURIAE CITY OF HENDERSON, NEVADA

On October 11, 1994, Amicus Curiae City of Henderson, Nevada, et al. (hereinafter referred to as "Amicus Henderson, Nevada") filed a petition for writ of certiorari entitled City of Henderson, Nevada et al. v. Nevada Entertainment Industries Inc. et al., Case No. 94-662, (hereinafter referred to as Henderson, Nevada Petition in 94-662) which raises the same question which has been raised in the O'Neill/Goodman Petition in 94-982; i.e. the correct meaning of the Huffman Abstention Doctrine expressed by this Court in Huffman v. Pursue Ltd., 420 U.S. 592 (1975) (which is radically different from that of other Abstention Doctrines). The Henderson,

Nevada Petition in 94-662 is presently before this Court on a Petition for Rehearing, filed on Feb. 3, 1995, (See copy at Appendix 1[1/] to this Amicus Curiae Brief) after this Court order, dated January 9, 1995, denying review.

The West Co. volume reporting the O'Neill case, 32 F3d 785 (Aug. 5, 1994), was received by mail in late November 1994. The facts and issues in the O'Neill/Goodman Petition in 94-982 were perceived by Counsel of Record to be so apposite to the Henderson, Nevada Petition in 94-662, that the City of Henderson filed a "Petitioners' Supplemental Brief" on December 14, 1994, (See copy at Appendix 2[2/] to this Amicus Brief) setting forth the importance of the O'Neill case and other recent abstention decisions:

Aiona v. The Judiciary of the State of Hawaii, 17 F.3d 1994 (CA 9, 1994), Benavidez v. Eu, 34 F.3d 825 (1994), Dubinka v. Judges of the Superior Court, 23 F.3d 222

1/ Less Appendix A, B, C, and D of the Petition for Rehearing.

2/ Less Appendix A of the Supplemental Brief.

(CA 9, 1994), Federal Express Corp. v. Tennessee Public Service Commission, et al., 693 F.Supp. 598 (M.D. Tenn 1988), Federal Express Corp. v. Tennessee Public Service Commission, et al., 878 F.2d 381 (CA 6, 1989), Federal Express Corp. v. Tennessee Public Service Commission, et al., 878 F.2d 1483 (CA 6, 1989), Federal Express Corp. v. Tennessee Public Service Commission, et al., 738 F.Supp. 1140 (M.D. Tenn., 1990), Federal Express Corp. v. Tennessee Public Service Commission, et al., 925 F.2d 962 (CA 6, 1991), and Members of Cal. Democratic Cong. Delegation v. Eu, 790 F.Supp. 925 (N.D.Cal. 1992). In its Supplemental Brief, Henderson, Nevada made two requests: (1) that this Court consider the merits of both the O'Neill/Goodman and Henderson petitions at the same Conference (see page 14); and (2) grant the petitions for writ of certiorari in O'Neill/Goodman No. 94-982, and in the Henderson Petition in 94-662, and set both cases for argument in tandem, on the questions raised in both of those cases, together with those raised by the

Respondents Nevada Entertainment Industries, Inc.'s separate petition for a writ of certiorari in Nevada Entertainment Industries, Inc. et. al. v. City of Henderson et al. 94-786 (See copy of Petitioner's Supplemental Brief in 94-662 at Appendix 2, pages 14 and 20).

Amicus Henderson, Nevada also transmitted copies of the four petitions filed in this Court in Nos. 90-1771, 92-643, 93-1969 and 94-662 to California Attorney General Daniel Lungren, who has recently been involved as a defendant in a number of important cases involving the Abstention Doctrine, such as: Benavidez v. Eu, 34 F3d 825 (CA 9, 1994); and Member of the California Democratic Congressional Delegation v. Eu, 790 F.Supp. 925 (N.D. Cal. 1992). In this regard, see the recent action taken by the California Attorney General, as reported in the Los Angeles Times News Articles for January 29, January 31 and February 4, 1995 at Appendix 2 to this Amicus Curiae Brief at pages H-1 thru H-3 and Appendix 3 to this Amicus Curiae Brief.

On January 4, 1995, Counsel of Record telephoned the Clerk's Office of the U.S. Supreme Court to ascertain the status of the Henderson, Nevada Petition in 94-662 and the O'Neill and Goodman Petition in 94-982 and was informed by a Clerk that the Henderson, Nevada Petition in 94-662 was on this Court's January 6, 1994 "Conference" calendar and the O'Neill and Goodman Petition in 94-982 was on the January 13, 1994 "Conference" calendar for disposition, but was being pulled that date (January 4,) and a response was being requested from the Respondent City of Philadelphia; et al. Amicus Henderson, Nevada, therefore, was taken back and extremely disappointed to learn on January 9, 1995 that this Court, having required a response from the City of Philadelphia on January 4, 1995, did not also continue to carry the Henderson Petition on its docket, as has been its practice in the past, see Supreme Court Practice, 7th Ed., by Stern, Gressman, Shapiro and Geller, at Section 4.16, "Important Similar Issues Already Pending

Before the Supreme Court" at pp. 192-193, and did not avail itself of the opportunity to consider both cases on the same conference calendar, as requested by Henderson, Nevada in its Supplementary Brief at pp. 14 and 20 in 94-662, (See copy at Appendix 2 to this Amicus Curiae Brief) but instead summarily denied the Henderson, Nevada Petition in 94-662 on January 9th.

The City of Henderson filed a Petition for Rehearing on February 3, 1995, in which it has asked this Court to reconsider its January 9, 1995 ruling in the light of this Court's constitutional duty (as a part of its appellate jurisdiction) to make constitutional judgments as to the Eleventh Amendment challenge asserted in case 94-662 which has never been considered by this Court. In this Brief, Amicus Curiae Henderson, Nevada requests this Court to make the same constitutional judgment in relation to No. 94-662, in the light of the amicus arguments herein. See Summary of Argument infra at p. 18 et. seq.

STATEMENT OF THE (O'NEILL/GOODMAN) CASE

The Philadelphia Traffic Court had exclusive jurisdiction over all summary offenses (42 Pa. C.S. section 1321) arising under Title 75 (Motor Vehicles) and under the Philadelphia Code, Title 12, enacted pursuant thereto, including parking violations.

The Pennsylvania Statute of Limitations barred the City of Philadephia from taking any action to enforce these summary offenses two years after the issuance of the summons (42 Pa. C.S. section 5333(e)).

(A) THE NEWLY ENACTED, COMPREHENSIVE PHILADELPHIA ORDINANCE ON PARKING VIOLATIONS PURSUANT TO STATE ENABLING STATUTE.

The traffic summonses which are the subject of this lawsuit were issued to Petitioners prior to June 1, 1989 and subject to the above provisions of law.

Pursuant to state enabling legislation, the Philadelphia City Council enacted a new comprehensive Ordinance.

amending Title 12 of the Philadelphia Code, entitled "Administrative Adjudication of Parking Violations", effective June 1, 1989 (City Code Sections 12-2800 et seq.).

It was the purpose of this new Code to reform the collection procedures of traffic tickets in Philadelphia by decriminalizing the process and creating a civil system. In particular, under the former Philadelphia Traffic Code, a defendant was required to be present in court before a disposition could be made of the case. The City was also barred from taking any action to enforce a summons two years after its issuance.

Under the new Administrative Code a summons unanswered within fifteen days of issuance is declared in default, a fine and penalty are assessed, and recorded as a debt due and owing to the City of Philadelphia subject to collection.

The Ordinance established a Bureau of Administrative Adjudication ("BAA"),

presided over by a hearing examiner. The BAA had no powers to summon an offender or enforce its adjudication. A person could appear before it on a strictly voluntary basis if he so wished to contest the debt which had been established.

The Philadelphia City Council did not transfer the jurisdiction over traffic tickets issued out of the Philadelphia Traffic Court prior to June 1, 1989. Rather, it provided that the holders of such tickets could elect to have their tickets adjudicated before the BAA, only if they gave their consent to its jurisdiction(section 12-2807(8), Brief, p.2).

However, the Deputy Director of Finance, a member of the executive branch of the City government without authority to do so, transferred all traffic tickets issued out of the Philadelphia Traffic Court prior to June 1, 1989 into the jurisdiction of the BAA. Thus, all tickets then existing and unadjudicated

within the exclusive jurisdiction of the Philadelphia Traffic Court had been transposed into a mature debt due and owing by the ticketholder to the City of Philadelphia in express violation of the Philadelphia Ordinances.

The BAA thereafter sent notice to each of the more than two million such ticketholders that they could elect to proceed either before the Philadelphia Traffic Court or the BAA. However, it did not inform them that their failure to proceed in the Traffic Court would constitute an irrevocable consent to the jurisdiction of the BAA.

Petitioners Goodman and O'Neill were among the aforesaid two million ticketholders who had not responded to a summons or other notices, to traffic tickets: Goodman traffic tickets: May 16, 1989, December 7, 1988, December 11, 1987, December 11, 1987 and February 26, 1987; O'Neill traffic tickets: May 1, 1989, October 10, 1988 and November 28,

1987, nor had they responded to the notice of the BAA of their right to elect the Traffic Court or BAA jurisdiction as set forth above.

(B) GOODMAN'S VOLUNTARY APPEARANCE BEFORE BAA.

On March 4, 1991 Goodman requested the BAA to schedule a hearing with connection with a parking ticket issued subsequent to June 1, 1989 within its jurisdiction. The BAA notified Goodman that it would list all tickets issued after June 1, 1989. When Goodman voluntarily appeared at the hearing, the hearing examiner then notified Goodman that he had listed an additional five tickets which had issued out of the Philadelphia Traffic Court prior to June 1, 1989.

(C) GOODMAN'S OBJECTION ON BASIS OF "LACK OF JURISDICTION" ARE OVERRULED; QUASI-JUDICAL ASSESSMENT OF FINES OF $173.00 AND $74.10.

Goodman, through counsel, objected on the basis of lack of jurisdiction and that the City was time-barred from taking any

action on those tickets by the Statute of Limitations. These objections were overruled. Goodman was assessed fines and penalties of $173.00 on the Philadelphia Traffic Court tickets, and $74.10 for the BAA tickets. Goodman has paid these amounts.

(D) O'NEILL VOLUNTARY APPEARANCE BEFORE BAA AND OBJECTION ON BASIS OF "LACK OF JURISDICTION" ARE OVERRULED; QUASI-JUDICIAL ASSESSMENT OF A FINE OF $45.00.

In April, 1991 O'Neill voluntarily contacted the Philadelphia Traffic Court to list three outstanding tickets issuing out of that court. O'Neill was then informed by the Traffic Court that they no longer listed parking violation cases. O'Neill then requested a hearing before the BAA. At the hearing, O'Neill objected to the jurisdiction of the BAA, which the hearing examiner denied and imposed fines and penalties in the reduced amount of $45.

(E) NEITHER GOODMAN NOR O'NEILL TOOK AN APPEAL FROM THE HEARING EXAMINER'S DECISION TO THE PARKING APPEALS

PANEL. BY ORDINANCE THE DECISION (AS A FINAL ORDER) COULD BE TAKEN TO THE PHILADLEPHIA COURT OF COMMON PLEAS.

Neither Goodman nor O'Neill took an appeal from the hearing examiner's decision to the Parking Appeals Panel and as provided by the Ordinance, the decision became a final Order from which an appeal to the Philadelphia Court of Common Pleas could then be taken. Neither Goodman nor O'Neill took an appeal to that court.

(F) THE FEDERAL CIVIL RIGHTS LITIGATION.

On October 30, 1991 O'Neill and Goodman filed a five count Complaint in the Federal Court for the Eastern District of Pennsylvania, and subsequently amending it to include a claim pursuant to 42 U.S.C. Section 1983. Jurisdiction was based upon 28 U.S.C. Sections 1331 and 1343(3) and (4). It alleged the City of Philadelphia, acting under color of law, had violated their Fourteenth Amendment due process rights depriving them of property. On October 15, 1992

Petitioners' Motion for Class Certification was denied, but the court agreed to proceed on the basis of a constitutional test case for all persons similarly situated.

(G) THE U.S. DISTRICT COURT REFUSED TO ABSTAIN AND GRANTS THE PETITIONERS' MOTION ON COUNT 2 FOR SUMMARY JUDGMENT.

On Cross Motions for Summary Judgment the District Court granted (March 29, 1993) the City's Motion with respect to Counts one, three, four and five, but declined the City's invitation to abstain under the Younger doctrine. The court granted Petitioners' Motion on Count two, holding that the City's defective notice to Petitioners had deprived them, without their consent or knowledge, of a Traffic Court proceeding in which the Statute of Limitations defense was available.

(H) THE U.S. DISTRICT COURT AWARDS DAMAGES IN THE AMOUNT OF $173.00 IN FAVOR OF GOODMAN AND ORDERED THE CITY TO VACATE ITS STATE JUDGMENT OF $45.00 AGAINST O'NEILL, IN DIRECT VIOLATION OF THE ELEVENTH AMENDMENT AND THE 1792 ANTI-INJUNCTION STATUTE 28 U.S.C. SECTION 2283.

Judgment was entered in favor of Goodman in the amount of $173 and the City was directed to vacate its outstanding $45 judgment against O'Neill. Because the City would be faced with a heavy financial burden concerning the potential claims of 2,713,975 persons similarly situated with regard to undisposed parking tickets issuing out of the Philadelphia Traffic Court, this portion of the Order as to supplemental relief was stayed pending appeal.

(I) THE CITY'S APPEAL.

The City filed a Notice of Appeal on April 20, 1993 from the judgment in the Federal District Court. Petitioners filed a cross appeal which was subsequently withdrawn. Jurisdiction was based upon 28 U.S.C. Section 1291.

(J) THE COURT OF APPEALS, SUI SPONTE, APPLIED THE HUFFMAN ABSTENTION DOCTRINE, BASED UPON "ABUSE OF DISCRETION" "IN DEFERENCE TO THE OVERWHELMING INTEREST OF THE CITY OF PHILADELPHIA AND THE STATE OF PENNSYLVANIA WITH RESPECT TO THEIR ON-STREET PARKING REGULATIONS" AND

REMANDED THE CASE WITH INSTRUCTIONS TO DISMISS.

Neither the statement of issues, the briefs, nor the oral argument of the City raised the issue of federal abstention in any of its forms. Panel member Senior Judge Garth raised the issue at the commencement of the City's presentation, to the exclusion of all other issues as briefed by both parties.

The Third Circuit Court of Appeals Judges Garth and Roth filed a majority Opinion August 5, 1994, holding that the District Court abused its discretion in failing to abstain from hearing O'Neill and Goodman's federal claims in deference to the overwhelming interest of the City of Philadelphia and the State of Pennsylvania with respect to their on-street parking regulations and remanded the case to the District Court with instructions to abstain under the Younger-Huffman Abstention Doctrine and to dismiss the plaintiff's complaint. A

dissent was filed by Judge Lewis, in which he factually distinguished this case from this Court's decision in Ohio Civil Rights Commission v. Dayton Christian Schools, Inc., 477 U.S. 619 (1986).

SUMMARY OF ARGUMENT

The judgment of the Court of Appeals for the Third Circuit is proper and should be affirmed, but the reasoning is erroneous and should be reexamined by this Court and corrected. This Court's decision in Huffman v. Pursue, Ltd., 420 U.S. 592 (1975) is controlling in the O'Neill/Goodman Petition in 94-982 and in the Henderson Petition in 94-662 and requires that both the O'Neill/Goodman and Nevada Entertainment Industries Inc.'s Civil Rights Actions be remanded to the District Court with instructions to abstain pursuant to Huffman v. Pursue, Ltd., 592 (1975) and to dismiss the plaintiff's complaint: (1) for its lack of federal court subject matter jurisdiction under the Eleventh Amendment, because

neither the State of Pennsylvania nor the State of Nevada has waived its Eleventh Amendment Constitutional Rights, and additionally; (2) on the separate and independant grounds of the Huffman Abstention Doctrine (Comity) enunciated by this Court; and additionally, (3) for failure to state a civil right cause of action under 42 U.S.C. Section 1983 and failure to establish subject matter jurisdiction in the federal cases. See the analysis in Dubinka v. Judges of the Superior Court 23 F3d 218 (April 8, 1994) (CA 9, 1994) footnote 11 on page 226 as to Reason (1) above, predicated upon the Eleventh Amendment and see pages 225-226 as to Reason (2) above as to this Court's Abstention Doctrine. See also the Supplemental Brief in Henderson, Nevada Petition in 94-662 at Appendix 2 to this Amicus Curiae Brief.

The question which is proposed by Petitioners O'Neill/Goodman Review:

QUESTION PRESENTED FOR REVIEW

> Did the Federal District Court abuse its discretion in declining to abstain on the basis of the Younger v. Harris doctrine, where Petitioners' Complaint under 42 U.S.C. Section 1983 was brought at a time when there was no state prosecution or other activity outstanding against the Petitioners; and the Petitioners had voluntarily appeared before a City agency for the sole remedial purpose of requesting the agency withdraw its unlawfully obtained jurisdiction over them; and where Petitioners did not take an appeal from the adverse order of the agency through the state court system, but rather commenced this suit in the Federal District Court of the Eastern District of Pennsylvania?

is flawed in that, where, as here, the trial facts in O'Neill/Goodman show that Huffman is applicable, the district court judge has no discretion to act and must dismiss the complaint for lack of subject matter jurisdiction; i.e., the subject matter is the State initiated application of new "Legislation" directly relating to the (10th and 11th Amendment) powers of the Sovereign State of Pennsylvania. Absent "extraordinary circumstances," whenever a Sovereign State asserts its Tenth and Eleventh Amendment powers, any challenge to the "correctness" of state law enforcement action, involving the

application of newly encated state legislation in connection with a commenced state quasi-judicial administrative adjudication (with right to state court judicial review), must be brought in the State Court, so that the State Court may properly interpret the meaning of the new state law. See Watson v. Buck, 313 U.S. 367 (1941) as cited in 420 Huffman v. Pursue, Ltd., at page 600 footnote 14. The Eleventh Amendment was specifically adopted by the States (1792) to forbid the use of the federal court system as the petitioners have attempted to do in the O'Neill/Goodman Petition in 94-982 and in the Henderson Petition in 94-662, and is the foundation for this Courts decision in Huffman v. Pursue, Ltd., supra, and the Huffman Abstention doctrine which requires a dismissal of the federal complaint, for lack of federal subject matter jurisdiction.

The question which is before this Court is a "live" "Substantial Federal Question." Guidance from this Court is needed in order to protect the essential Constitutional rights

governing the orderly administration of State governmental powers, raised by the O'Neill/Goodman and in the City of Henderson Petitions, which are also involved in other important pending litigation. For example, California Attorney General Daniel Lungren has recently raised a defense to the maintenance of several current federal civil rights actions in the State of California which are presently challenging Prop. 187 (involving defenses to federal action which are identical to those presented in O'Neill/Goodman and the City of Henderson cases). See the Los Angeles Times News Articles dated January 29th, Janaury 31st and February 4th, appearing in Appendix 1 at page H-1 thru H-3 and Appendix 3 to this Amicus Curiae Brief at page 3-1.

A proper "substituted" Question for Review is:

QUESTION PRESENTED FOR REVIEW

"Does the Eleventh Amendment preclude the filing of the O'Neill/Goodman Civil Rights Action in the U.S. District Court for lack of federal subject matter jurisdiction."

ARGUMENT

Amicus contends that the exercise of Article III federal jurisdiction as to the Civil Rights Complaint in O'Neill/Goodman is barred for two separate and distinct reasons: FIRST, the primary (first principle), Eleventh Amendment right under the U.S. Constitution so commands, and SECOND, this Court's decisions (judgment and opinion) in the Civil proceedings entitled Huffman v. Pursue, Ltd., 420 U.S. 592 (1975) as extended to Quasi-Judicial civil proceedings, see Ohio Civil Rights Commission v. Dayton Christian Schools, Inc., 477 U.S. 619 (1986) known as this Courts "Huffman Doctrine" and the doctrines of "res judicata" and "collateral estoppel" as applied to the parking tickets which were at issue in such quasi-judicial proceeding requires abstention (being a secondary, corollary right arising out of the Eleventh Amendment).

In this regard, the City of Henderson contends that one of the perquisites flowing

from state sovereignty and the Tenth and Eleventh Amendment is the right:

(1) to enact legislation on behalf of the state government;

(2) to have such newly enacted legislation interpreted for the first time by a state court which is charged with the duty to give such legislation a constitutional interpretation and save such legislation where possible, Watson v. Buck, 313 U.S. 367 (1941) [especially where the state has initiated action under its state police power, and litigation has commenced under said legislation (in which a quasi-judicial administrative adjudication is subject to state court judicial review)]; and

(3) where possible, as where the Sovereign is a defendant in a Federal Court and files its own declaratory judgment action in the State Court [as was done in the Henderson, Nevada case, and as the California Attorney General has done in relation to Prop. 187 litigation], not to be burdened by the duplicate cost of litigation of the same issue

in two different courts. One positive advantage of this last perquisite, as stated, is that it assigns priorities and does away with multiple litigation and the confusion which is presently generated by civil rights activists in their so-called race to the Courtroom.

In four years of litigation, in Henderson, Nevada Petition in 94-662, Henderson, Nevada has continuously argued to this Court in 4 separate petitions that an "Eleventh Amendment" grounds is <u>different</u> from "Huffman Abstention" grounds in the following respect. Under the Eleventh Amendment challenge the U.S. District Court is barred from assuming jurisdiction of the federal complaint, because its Article III power i.e. "subject matter jurisdiction" is diminished by the provisions of the Eleventh Amendment, as in Henderson, Nevada Case No. 94-662, where, absent "extraordinary circumstance," a Sovereign State's right, under the Tenth and Eleventh Amendments, to license businesses and punish fraud, may not (wrongfully) be

interfered with, as did actually occur in the Henderson, Nevada Civil Rights Action filed in the U.S. District Court of Nevada. In O'Neill/Goodman (Case No. 94-982) the jurisdiction of the U.S. District Court in Philadelphia is similarly limited by the provisions of the Eleventh Amendment i.e., the right of the Sovereign State of Pennsylvania to both legislate and judicially interpret City Ordinances authorized by State Statutes (as to legislation and litigation involving parking ticket monetary penalties) which requires such litigation to be brought before its State Judiciary and which may not be interfered with where the State is unwilling to waive its Sovereign rights and defenses. See also Watson v. Buck 313 U.S. 367 (1941).

A motion to dismiss upon the mere assertion of a Huffman abstention defense without also asserting the Eleventh Amendment Challenge raises a different question; i.e. that is; whether the federal complaint must be dismissed because of the trial Court's judgment (i.e. conclusion) that the Huffman

abstention doctrine should be applied. The Federal Court may or may not have subject matter jurisdiction as a matter of law. As extended by this Court's holding in Ohio Civil Rights Commission v. Dayton Christian Schools, supra, re Quasi-Judicial proceedings, the Huffman abstention defense is predicated upon the assertion that such (concurrent) jurisdiction may or will interfere with the Sovereign's Right under the Tenth and Eleventh Amendment.

When either an Eleventh Amendment or Huffman abstention affirmative defense is properly raised by or on behalf of the Sovereign State, the only question before the district court on the jurisdictional issue is whether the legistation under attack is unconstitutional in every sentence, clause, phrase, etc., so that no judicial interpretation can save it. Watson v. Buck, 313 U.S. 367 (1941). In the O'Neill/Goodman Civil Rights Action, plaintiffs' complaint has challenged the application of the City's ordinance to these defendants, and not the

ordinance on its face. The U.S. District Court therefore was required to dismiss the action on the mere assertion of the Huffman Abstention Doctrine, pursuant to this Courts prior decision in Watson v. Buck, supra. See also the analysis and decision of Dubinka v. Judges of the Superior Court, 23 F3d 222 (CA 9, 1994).

While it is true the Eleventh Amendment defense may be "waived", it was not waived in this case, in as much as the Huffman Abstention Doctrine itself is predicated upon the assertion of an Eleventh Amendment challenge. That affirmative defense was raised at the trial level and was wrongfully rejected by the trial judge. On appeal, the Court of Appeals had a duty and obligation to raise the Eleventh Amendment subject matter jurisdictional challenge, sui sponte, and did so.

At a bare minimum, the Huffman precedents which appear in the Federal Reporter system, customarily have evoked a ruling that the federal complaint was barred and must be

dismissed, as was the Ninth Circuit's final judgment on November 2, 1993 in the Henderson cross-appeal below in Nevada Entertainment Industry Inc. v. City of Henderson, 8 F3 1348 (1993). Without exception, the foundational Eleventh Amendment question is never discussed. See, however, the exception in World Famous Drinking Emporium v. City of Tempe, 820 F.2d 1079 (CA 9, 1987), at 1084. See, also, the scholarly observations of U.S. District Judge Wiseman in a series of five opinions over a three year period in Federal Express Corp. v. Tennessee Public Service Commission, etc., 693 F.Supp 598 (M.D. Tenn., 1988); 878 F.2d 381 (CA 6, 1989); 878 F.2d 1483 (CA 6, 1989); 738 F.Supp. 1140 (M.D. Tenn., 1990); and 925 F.2d 962 (CA 6, 1991).

Once the Tenth and Eleventh Amendment State's Police and judicial powers have been invoked (from "on-going" citations to quasi-judicial proceedings subject to judicial review), as in the O'Neill/Goodman Petition in 94-982, involving the assessment of parking fees in lieu of criminal prosecution which are

subject to review by the State's judicial powers including review within the quasi-judicial system:

(1) the federal court cannot exercise jurisdiction over the same subject matter without wresting control from the state by enjoining the state proceedings (as would be done in this case if allowed to continue). This, in effect, makes the State judicial system a "defendant" in the federal action -- a state's Sovereign Right to be free from such federal intrusion is the very reason the Eleventh Amendment was adopted!

(2) the federal courts cannot Constitutionally interfere with the State's on-going adjudication, unless the State's judicial system is shown to be "inadequate," and "a federal court should assume that state procedures will afford an adequate remedy, in the absence of unambiguous authority to the contrary." [Pennzoil Co. v. Texaco, Inc., 481 U.S. 1 (1987), at 15]; and the federal plaintiff has the burden of proof in federal court of establishing that the state judicial

system will violate federal constitutional law.

(3) If the federal complaint contains no recited facts, which if proven, would show that the state judicial system is "inadequate," the federal plaintiff has not only failed to state a cause of action -- the federal plaintiff has also failed to file a complaint which invokes federal jurisdiction, and the federal complaint must be dismissed.

The Eleventh Amendment forbids the filing of the O'Neill/Goodman Civil Rights Action in Federal Court. O'Neill and Goodman's civil right complaint is not, and as a matter of law, cannot be what Petitioners represent it to be: an "independent civil rights action in the federal court which has been filed after the quasi-judicial proceedings have become final." As a matter of law, it is an action brought by a citizen of Pennsylvania in the federal court against the City of Philadelphia acting as the agent of the Sovereign State of Pennsylvania, which the Eleventh Amendment forbids, which collaterally attacks a

quasi-judicial adjudication of the City of Philadelphia for actions taken by it, acting as an agent for the Sovereign State of Pennsylvania, in a pending quasi-judicial traffic violation proceeding within the Pennsylvania State Judicial System, seeking a civil adjudication that its traffic laws as applied are unconstitutional (which is the equivalent of and as objectionable as a declaration judgment or injunction). As such, the filing of the Federal Civil Rights Complaint, the federal trial below, and this appeal to the Court of Appeal in the federal court are in direct conflict with and violate the Eleventh Amendment to the Federal Constitution and, preclude the Federal Court from assuming "subject matter jurisdiction" of that cause of action under its Article III Powers. In Welch v. State Dept. of Highway and Public Transportation et al., 483 U.S. 468, at 472; 97 L.Ed.2 389, at 395 Justice Powell writing the plurality opinion for 4 justices held:

The Eleventh Amendment provides:

"The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.:

The Court has recognized that the significance of the Amendment 'lies in its affirmation that the fundamental principle of sovereign immunity limits the grant of judicial authority in Art. III' of the Constitution. Pennhurst State School & Hospital v. Halderman, 465 U.S. 89, 98, 79 L.Ed.2d 67, 104 S.Ct. 900 (1984) (Pennhurst II). Accordingly, as discussed more fully in Part V of this opinion, the Court long ago held that the Eleventh Amendment bars a citizen from bring suit against the citizen's own State in federal court, even though the express terms of the Amendment refer only to suits by citizens of another State. Hans v. Louisiana, 134 U.S. 1, 10, 33 L.Ed. 842, 10 S.Ct. 504 (1890). See Edelman v. Jordan, 415 U.S. 651, 662-663, 39 L.Ed.2d 662, 94 S.Ct. 1347 (1974); Employees v. Missouri Dept. of Public Health and Welfare, 411 U.S. 279, 280, 36 L.Ed.2d 251, 93 S.Ct. 1614 (1973). For the same reason, the Court has held that the Amendment bars suits in admiralty against the States, even though such suits are not, strictly speaking, 'suits in law or equity.' Ex parte New York, No. 1, 256 U.S. 490, 497, 65 L.Ed. 1057, 41 S.Ct. 588 (1921) (Eleventh Amendment bars in personam actions against a State by its citizens); Ex parte New York, No. 2, 256 U.S. 503, 65 L.Ed. 1063, 41 S.Ct. 592 (1921) (Eleventh Amendment bars actions in rem against vessel owned by the State and employed exclusively for governmental purposes). See Florida Dept. of State v. Treasure Salvors, Inc., 458 U.S. 670, 683, n 17, 73 L.Ed.2d 1057, 102 S.Ct. 3304 (1982) (plurality opinion

of Stevens, J.); id., at 706-710, 73 L.Ed.2d 1057, 102 S.Ct. 3304 (White, J., concurring in judgment in part and dissenting in part)."

See also the annotation "Supreme Court's Construction of Eleventh Amendment, Restricting Federal Judicial Power over suits against States," 106 L.Ed.2d 660 at 677:

> "the following Supreme Court decisions have expressly recognized that the Federal Constitution's Eleventh Amendment is not limited in its application to suits against a state as a named defendant, but rather that <u>its application should be determined by the essential nature and effect of the suit in question</u>: Poindexter v. Greenhow (1884) 114 US 270, 29 L Ed 185, 5 S Ct 903; Re Ayers (1887) 123 US 443, 31 L.Ed. 216, 8 S Ct 164; Pennoyer v. McConnaughy (1891) 140 US 1, 35 L Ed 363, 11 S Ct 699; Hopkins v. Clemson Agricultural College (1911) 221 US 636, 55 L Ed 890, 31 S Ct 654; Ex parte New York (1921) 256 US 490, 65 L Ed 1057, 41 S Ct 588; Principality of Monaco v. Mississippi (1934) 292 US 313, 78 L Ed 1282, 54 S Ct 745; Worcester County Trust Co. v. Riley (1937) 302 US 292, 82 L Ed 268, 58 S Ct 185; and Scheuer v. Rhodes (1974) 416 US 232, 40 L Ed 2d 90, 94 S Ct 1683, 71 Ohio Ops 2d 474.
>
> It was observed by the Supreme Court in Poindexter v. Greenhow (1884) 114 US 270, 29 L Ed 185, 5 S Ct 903, infra section 15[c], that the question whether a suit is within the prohibition of the Eleventh Amendment

is not always determined by reference to the nominal parties on the record, and that the Eleventh Amendment is to be substantially applied in furtherance of its intention, and not evaded by technical and trivial subtleties.

The court in Re Ayers (1887) 123 US 433, 31 L Ed 216, 8 S Ct 164, infra section 15[b], also stating that the question whether a suit is within the prohibition of the Eleventh Amendment is not always determined by reference to the nominal parties on the record, added that such amendment's prohibition must be determined by a consideration of the nature of the case as presented on the record.

In Hopkins v. Clemson Agricultural College (1911) 221 US 636, 55 L Ed 890, 31 S Ct 654, the Supreme Court recognized that looking through form to substance, the Eleventh Amendment applies not only where the state is actually named as a party defendant on the record, but also where the proceeding, though nominally against an officer, is really against the state, or is one to which it is an indispensable party.

In Scheuer v. Rhodes (1974) 416 US 232, 40 L Ed 2d 90, 94 S Ct 1683 71 Ohio Ops 2d 474, infra section 22, which involved a federal civil rights action against a state governor and other state officials, the Supreme Court stated that it was well established that the Eleventh Amendment barred suits against the state not only when it was the named party, but also when it was the party in fact. The court noted that the applicability of the Eleventh Amendment was to be determined not by the mere names of the titular

parties, but by the essential nature and effect of the proceeding as it appeared from the entire record." (our emphasis).

A COMPARATIVE ARGUMENT IN RELATION TO: (1) THE "SIMILARITY" OF THE HENDERSON, NEVADA PETITION IN 94-662 AND (2) THIS COURT'S PRACTICE TO RETAIN "IMPORTANT SIMILAR ISSUES ALREADY PENDING BEFORE THE SUPREME COURT."

(See Petition for Rehearing at Appendix 1, page 1-20)

(A) STATEMENT OF THE (CITY OF HENDERSON) CASE.

In quasi-judicial administrative proceedings, the City of Henderson City Council determined that the Federal Plaintiffs and Respondents herein had committed fraud in applying for a revenue-based business license, and issued an order revoking their business license. [A business license will not issue unless the intended business operation is located in a proper zone.] See, in this regard, City of Las Vegas v. Nevada Industries, 772 P.2d 1275, at 1277. Rather than appeal the City's action within the state court judicial system, as provided for by

State law and municipal ordinance [see City of Henderson Municipal Code (hereinafter "H.M.C.") Section 4.06.160, the Respondents filed a 42 U.S.C. Section 1983 civil rights action in the United States District Court for the District of Nevada during the pendency of the state license revocation enforcement proceedings, seeking an injunction which would nullify the City Council's Order.

The federal civil rights action was initiated by the Respondents as a defense to the ongoing state license revocation enforcement proceedings. (A classic "Huffman Abstention" fact situation). The case is before this Court for review in the Henderson, Nevada Petition in 94-662, in a petition for a rehearing (see Appendix 1 to this Amicus Curiae Brief) on both the "subject matter jurisdiction" issue and the concomitant res judicata and collateral estoppel questions.

On November 2, 1993, the Ninth Circuit Court of Appeals [Browning and

Canby, Circuit Judges, Kelleher, Senior District Judge] filed its opinion in Nevada Entertainment Industries, Inc. et al. v. City of Henderson, 8 F.3d 1348 (argued and submitted May 10, 1993 and decided November 2, 1993) in which it awarded judgment to the City on its cross-appeal. The City of Henderson's cross-appeal had argued: (1) that the United States Supreme Court's opinions in Huffman v. Pursue, Ltd., 420 U.S. 592 (1975) and Ohio Civil Rights Commission v. Dayton Christian Schools, Inc., 477 U.S. 619 (1986) controlled the disposition of the cross-appeal; and (2) that the Younger-Huffman abstention doctrine was predicated upon the 200 year old Eleventh Amendment and Anti-Injunction Statute, which required a dismissal for lack of "subject matter jurisdiction" and vacation of the District Court's Injunction of 4-years duration which had wrongfully prevented the City Council's quasi-judicial order of license revocation from being implemented. See

Petition for Writ of Mandamus (or Certiorari under Rule 11) in Case No. 93-1969 at pages 21 thru 65 at Appendix 17 to this Petition for Writ of Certiorari.

However, on April 7, 1994, the Nevada Entertainment Industries panel withdrew its November 2, 1993 opinion upholding Huffman-Younger abstention, and on May 4, 1994, filed a memorandum decision holding the Younger abstention issue to be moot!

In its Petition for Writ of Certiorari, in the Henderson, Nevada Petition in 94-662, the City of Henderson contends that the Court's actions on April 7 and May 4 constitute a violation of the sovereign right of the State of Nevada under the Eleventh Amendment and a usurpation of judicial power, and are void.

Recent decisions of the Ninth Circuit underscore the immediate need for this Court to undertake a definitive analysis of the meaning of Huffman-Younger

abstention, and resolve the present split of authorities for the future guidance of all federal trial courts.

(B) COMPARATIVE ARGUMENT IN RELATION TO HENDERSON, NEVADA PETITION IN 94-662.

(1) THIS COURT'S DECISIONS IN WATSON V. BUCK, HUFFMAN V. PURSUE, LTD., AND UNIVERSITY OF TENNESSEE V. ELLIOTT, ARE DISPOSITIVE OF THE QUESTIONS PRESENTED BY THIS PETITION.

Twenty years ago, Appellant in Huffman v. Pursue, Ltd., 420 U.S. 592 (1975), contended in Appellant Huffman's Jurisdictional Statement, Opening Brief, at oral argument, and in a Petition for a Rehearing (see 421 U.S. 971), that in a 42 U.S.C. section 1983 action involving what constitutes a "collateral attack" against a "pending" state decision or order, the "jurisdiction" question (over the "res" subject matter) must first be addressed by the Federal Court, even before a resolution of any question as to any extension of the Younger abstention doctrine in Younger v. Harris, 401 U.S. 37 (1971) to civil cases.

Huffman arose as an attack against a state court's order determining the existence of a public nuisance and involved the use of real property. This type of action was regarded at common law as "in rem," where jurisdiction over the subject matter of the action (the real property or the "res") could only be before one court at a time. See Toucey v. New York Life Ins., Co., 314 U.S. 118, 86 L.3d 100 (1941). Following Toucey, supra, Congress enacted the anti-injunction statute in its present form. Thereafter, this Court again had occasion to consider the "in rem" exception in Donovan v. Dallas, 377 U.S. 408, 12 L.Ed.2 409, 84 S.Ct. 1579 (June 8, 1964). There, Justice Black, speaking for six members of the court, acknowledged the continued vitality of that exception at page 412:

> "Early in the history of our country a general rule was established that state and federal courts would not interfere with or try to restrain each other's proceedings. That rule has continued substantially unchanged to this time. An exception has been made in cases where a court has custody of property, that is, proceedings in rem or quasi in rem. In

> such cases this Court has said that the state of federal court having custody of such property has exclusive jurisdiction to proceed. Princess Lida of Thurn v. Thompson, 305 U.S. 456, 465-468, 83 L.Ed. 285, 290-292, 59 S.Ct. 275.

Nothing in existing case law contradicts this basic rule on jurisdictional power. As recently as Mitchum v. Foster, 407 U.S. 225, 32 L.Ed.2 705, 92 S.Ct. 2151 (June 19, 1972) this Court acknowledged this "in rem" exception to the blanket prohibition of the anti-injunction statute, at page 713:

> 'In addition to the exceptions to the anti-injunction statute found to be embodied in these various Acts of Congress, the Court recognized other "implied" exceptions to the blanket prohibition of the anti-injunction statute, to enjoin a state court proceeding in order to protect its jurisdiction of a res over which it had first acquired jurisdiction. (See e.g., Toucey v. New York Life Ins. Co., 314 U.S., at 135-136, 86 L.Ed. at 105, 106, 137 A.L.R. 967; Freeman v. Howe, 24 How 450, 16 L.Ed. 749; Kline v. Burke Construction Co., 250 U.S. 226, 67 L.Ed. 226, 43 S.Ct. 79, 24 A.L.R. 1077.)'

and, after a historical discussion of Toucey v. New York Life Ins. Co., supra, concluded at page 714:

> '. . . The congressional response to Toucey was the enactment in 1948 of the anti-injunction statute in its present form in 28 USC Sect. 2283...to "restore the basic law as generally understood and interpreted prior to the Toucey decision..."'

The infirmities noted above, being apparent on the face of the complaint as

filed, the federal court should have dismissed the federal action for lack of jurisdiction.

On appeal, Appellant's primary argument had been that the trial court lacked "subject matter jurisdiction" of the federal civil rights action which was filed on December 1, 1972, inasmuch as a final judgment of abatement of the public nuisance involved had been entered in the State Court on the previous day, November 30, 1972, and the state action and "res" was still "pending" in the state court for post-trial motions, and until the appeal period had expired.

Justice Rehnquist's majority opinion in Huffman did not address the controlling United States Supreme Court lack of "subject matter jurisdiction" precedents which had been cited by Huffman regarding the "res" jurisdiction issue. Instead, his opinion decided the case solely on the basis of the Younger issue, without ruling explicitly whether Younger was jurisdictional. However, his opinion remanded the case to the federal trial court

for a determination as to whether "the District Court may assume jurisdiction under an exception to the policy against federal judicial interference with state court proceedings of this kind" (our emphasis). See Huffman at 420 U.S. 612. That ambiguity generated a dissent by Justices Brennan, Douglas, and Marshall, see Huffman at 420 U.S. 613, fn. 1, which drew into question whether Younger v. Harris abstention was jurisdictional.

As the only member participating in the Huffman v. Pursue, Ltd., oral arguments now setting on this Court, Chief Justice Rehnquist will recall that, during oral argument, Huffman replied to Justice Stewart's Query (as to whether Huffman would be satisfied if the Younger abstention decision were to be expanded to civil cases including Huffman v. Pursue, Ltd.,) that he would not, because the first question which the Court must answer was whether on the date the civil right action was filed, the Three-Judge District Court had "subject matter

jurisdiction" to consider the civil right action, which it did not have under the Toucey case. It must necessarially follow therefore that the Huffman case was predicated upon lack of subject matter jurisdiction, or else the High Court would have been required to apply Toucey and hold the federal court did not have subject matter jurisdiction or distinguish that binding precedent. Realizing that the District Court lacked subject matter jurisdiction, the Court could under its appellate authority remand the case for application of the new test to avoid a constitutional conflict with the Eleventh Amendment and "res" exception.

While Justice Rehnquist's majority opinion avoided addressing Appellant Huffman's primary lack of "subject matter jurisdiction" contention, it further confused the issue by emphasizing the fact that the Huffman Court was not suggesting "that the normal rules of res judicata and judicial estoppel do not operate to bar relitigation in actions under 42 U.S.C. section 1983 of federal issues

arising in state court proceedings...Our assumption is made solely as a means of disposing of appellee's contentions without confronting issues which have not been briefed or argued in this case." See Huffman, at 420 U.S. 606, fn.18. The confusion which was caused required Prosecutor Huffman to file a petition for rehearing which, unfortunately, was denied without resolution of the "subject matter jurisdiction" and Eleventh Amendment issues. See copy of the Huffman Petition for Rehearing to this Amicus Curiae Brief at Appendix G-1 thru G-39 to the Petition for Rehearing in Henderson, Nevada Petition in 94-662 which appears at Appendix 2 to this Amicus Curiae Brief.

Amicus Curiae submits the Statement of Chief Justice Rehnquist in Ohio Civil Rights Commission v. Dayton School, 477 U.S. 619 at L 26 that:

> "We think, however, that this argument misconceives the nature of Younger abstention. It does not arise from lack of jurisdiction in the District court, but from strong polices counseling against the exercise of such jurisdiction where particular kinds of state

> proceedings have already been commenced. A State may of course voluntarily submit to federal jurisdiction even though it might have had a tenable claim for abstention. See Brown v. Hotel Employees, 468 US 491, 500, n 9, 82 L.Ed 2d 373, 104 S Ct 3179 (1984); Ohio Bureau of Employment Services v. Hodory, 431 US 471, 479-480, 52 L Ed 2d 513, 97 S Ct 1898 (1977); Sosna v. Iowa, 419 US 393, 396-397, n 3, 42 L Ed 2d 532, 95 S Ct 553 (1975). But in each of these cases the State expressly urged this Court or the District Court to proceed to an adjudication of the constitutional merits. We think there was no similar consent or waiver here, and we therefore address the issue of whether the District Court should have abstained from deciding the case."

does not resolve the above issue and does not apply where the State of Nevada and State of Pennsylvania do not waive their primary Eleventh Amendment Sovereign rights. See Argument, supra, at p. 23 et seq.

Questions 1 and 2 of the Henderson, Nevada Petition in 94-662 raise the same two issues of "lack of subject matter jurisdiction" and "estoppel" and "collateral estoppel" which were discussed in Huffman, in the light of the Huffman background (a "pending" state action). The trial court record below and Petition herein place before

this Court the identical lack of "subject matter jurisdiction" issue which was argued in Huffman and, in addition, the "res judicata/collateral estoppel" question which was discussed by Justice Rehnquist, but was not then before the Huffman Court for decision. Petitioner contends that in the intervening twenty years, the lack of "subject matter jurisdiction" basis of Huffman has been clearly established and the "res judicata/collateral estoppel" issues which were presented below has been firmly resolved in University of Tennessee v. Elliott, 478 U.S. 788 (1986).

To the extent that the Respondents civil rights action in the Henderson, Nevada Petition in 94-662 attempts an attack upon the "new, comprehensive municipal zoning code and municipal license code" enacted in 1989, such is barred by the abstention doctrine expressed in Watson v. Buck, 313 U.S. 387 (1941) and the federal right of a state to have newly enacted legislation on important state issues, containing a severability clause, construed initially by the state court system. [See

Huffman v. Pursue, Ltd., supra, at fn. 14 for reference to Watson v. Buck principle.]

Respondents request for a restraining order and a temporary injunction in Henderson, Nevada Petition in 94-662 should have been denied, and the civil rights complaint should have been dismissed at the outset on the City Attorney's reliance on the "clean hands" doctrine that a Court of Equity has no jurisdiction to issue relief to a person who comes into court with dirty hands (a quasi-judicial finding of fraud). Further, on said Petition, the Ninth Circuit is bound by its prior findings of fact and conclusions of law in its Opinion and Judgment filed on November 2, 1993 which, although withdrawn, are still undisturbed and recite that the trial facts are controlled by this Court's ruling in Huffman v. Pursue, Ltd., supra, as explicated by its ruling in Ohio Civil Rights Commission v. Dayton Christian Schools, Inc., supra, and its dicta in New Orleans Public Serv., Inc. v. City Council of New Orleans, 491 U.S. 350 (1989).

In comparing the two cases, it should be noted that the Henderson, Nevada record clearly establishes: (1) the Henderson quasi-judicial license revocation hearing was and is still "pending" before the City Council and had not been terminated when Nevada Enterprises filed its federal complaint on April 24, 1990; and (2) it clearly was, therefore, a "closed question," which had been answered eight years earlier by this Court's 1986 decision in Dayton Christian School (as the Ninth Circuit's opinion in 8 F.3d 1348 so held) and was not an "open question."

On the other hand, the final judgment in O'Neill v. City of Philadelphia, 32 F.3d 725 (Aug. 5, 1994), petition for writ of certiorari filed in this Court on November 30, 1994, as 94-982, contains rulings on several quasi-judicial proceedings, some in which the state quasi-judicial hearing was "pending" and thus was a "closed question" which has been decided in Dayton Christian Schools, and others in which the state hearing had been terminated and theoretically, under this

Court's Abstention decision was an "open question." See page 746. The majority opinion of Judges Garth and Roth, and the dissenting opinion of Judge Lewis in the O'Neill case are realistic examples of the conflict which exists on the Ninth Circuit of 38 justices -- yet neither opinion addresses the fundamental question relating to the "first principle," Eleventh Amendment "sovereign right" of each State, as a Sovereign, herein claimed by the State of Nevada. Had those justices been required to consider and apply the primary Eleventh Amendment right of the State of Pennsylvania, they would have been able to agree unanimously on the judgment of the majority-but for a different reason.

In as much as the petition herein in O'Neill and Goodman Case No. 94-982 is confined to those cases which had become final in the administrative proceedings or upon which the petitioners claimed they had not subjected themselves to the jurisidiction of the Court, the position of Amicus Henderson,

Nevada's is the same in both cases that the Eleventh Amendment Challenge is a bar to all of their claims.

CONCLUSION

Amicus Henderson, Nevada submits that this Court should conform its prior order in Henderson, Nevada Petition in 94-662 dated January 9, 1995 and bring it into agreement with the declared public policy which Congress considered and approved in principle in 1976, by confirming the right of the State of Nevada [and other States, such as California and Pennsylvania] who are engaged in the same type of Eleventh Amendment litigation, to an obligatory judicial review by this Court as to the Eleventh Amendment "subject matter jurisdiction" questions. See Appendix 1.

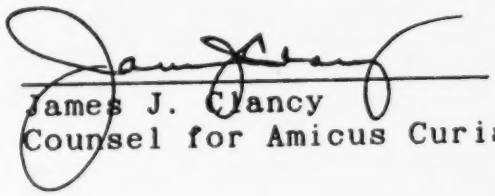
Accordingly, the State of Nevada prays that a new and different order be entered requiring the following disposition:

> that the State of Nevada petition for writ of certiorari be granted and the cause set for argument on the subject matter jurisdictional issue [which was raised but left unanswered in the appellate proceedings which were conducted in Huffman v. Pursue, Ltd., 420

U.S. 592 (1975)], to be heard in tandem with the jurisdictional issue raised in O'Neill v. City of Philadlephia et al., 94-982, both of which involve Eleventh Amendment and Huffman abstention considerations. See Supreme Court Practice, 7th Ed., by Stern, Gressman, Shapiro and Geller, at Section 4.16, "Important Similar Issues Already Pending Before the Supreme Court, at pages 192-193."

Dated: February 6, 1995

Respectfully Submitted,



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